Supreme Court, U.S.
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85-1054

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

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Union, *et al.*

Date: December 18, 1985

QUESTIONS PRESENTED *

1. Did the District Court err in concluding that an order of the Interstate Commerce Commission authorizing the grant of trackage rights made it illegal for rail labor to obtain a voice in the crew selection process which, the court determined, had been precluded by the Commission's order?

2. Did the District Court err in concluding that it had the jurisdiction, notwithstanding the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to enjoin a strike by which rail labor sought to obtain a result which the District Court believed was precluded by an Order of the Interstate Commerce Commission?

3. If it is assumed *arguendo* that the District Court had the jurisdiction to enjoin a strike, did Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, preclude such an injunction where the railroad refused to bargain, supposedly because an order of the Interstate Commerce Commission precluded the relief which rail labor was seeking?

4. Does the injunction in this case violate the Thirteenth Amendment to the Constitution of the United States, Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, and Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, because it prohibits rail employees from refusing to work for respondent Missouri Pacific Railroad?

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* Petitioners in this case include the United Transportation Union and the following individuals who were named as defendants in their capacities as union representatives in the suit by respondent Missouri Pacific Railroad: I. Newcomb and R. D. Hogan (General Chairmen); K. R. Guethle (First Vice Chairman); W. J. Shelton, R. L. Helms, T. K. Arthur, R. W. Bretch, R. P. Shocklee, B. J. Bennett, J. E. Queathem, and K. M. Danneman (Local Chairmen).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

Petitioners United Transportation Union [hereinafter, "UTU"], *et al.*,[1] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals to review before judgment the case presently pending in that court of appeals in 8th Cir. No. 84-1465, which is an appeal from the decision, judgment and permanent injunction of the United States District Court for the Eastern District of Missouri in *Missouri Pacific R.R. v. UTU,* E.D. Mo. Civil Action No. 83-771C(1).

OPINIONS BELOW

Since this is a request for a writ of certiorari before judgment, there is no opinion or order of the Eighth Circuit in

[1] The petitioners in this case are listed in footnote * on page i, *supra.*

this case. The decision, permanent injunction and judgment of the District Court on appeal, were filed on March 30, 1984, and are not reported; they are reproduced as Appendices B, D and E, respectively, to this Petition. The District Court issued an earlier decision on March 1, 1984, in support of several of its rulings which it made final on March 30, 1984; that decision is reproduced as Appendix C to this Petition and is reported at 580 F.Supp. 1490.

JURISDICTION

This Court has the jurisdiction by virtue of 28 U.S.C. § 1254(1) to review this case before judgment by the Court of Appeals. Petitioners UTU, *et al.*, filed a timely notice of appeal to the court of appeals on April 10, 1984, from the permanent injunction and judgment of the district court issued March 30, 1984, thereby invoking the appellate court's jurisdiction under 28 U.S.C. § 1291. This case has been fully briefed in the court of appeals and was argued on January 14, 1985. Nevertheless, this petition is timely since the judgment of the court of appeals has not yet been issued. 28 U.S.C. § 2101(e).

STATEMENT OF THE CASE

This petition for a writ of certiorari before judgment is presented by petitioner UTU as a companion case to its cross-petition for a writ of certiorari in Supreme Court No. 85-983 by which petitioner has asked this Court to review the decision by the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC* [*hereinafter, "BLE v. ICC"*], 761 F.2d 714 (D.C.Cir. 1985). That cross-petition was filed in response to separate petitions for writs of certiorari to review the District of Columbia Circuit's decision by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in No. 85-792 and by the Missouri-

Kansas-Texas Railroad Company [hereinafter, "MKT"] in No. 85-793.

Petitioners have filed this petition for a writ of certiorari to the Eighth Circuit to place before this Court issues which necessarily flow from an acceptance of the ICC's position in No. 85-792 that its orders supersede the Railway Labor Act, 45 U.S.C. § 151, *et seq.* If the ICC's belief is sustained then the next issues which must be addressed are whether a strike in response to the carriers' unilateral action is illegal, and, if so, whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprives federal courts of all equity jurisdiction to enjoin such a strike. Since the district court in the Eighth Circuit case reached its decision by relying upon the ICC orders subsequently vacated by the District of Columbia Circuit in *BLE v. ICC, supra,* and since it is important to the entire rail industry (management and employees alike) and to the public that these companion issues be resolved quickly, petitioner UTU respectfully submits that a writ of certiorari before judgment is appropriate in this case, if this Court grants the petitions in Nos. 85-792, 85-793 and 85-983. *See, New Haven Inclusion Cases,* 399 U.S. 392, 418 (1970); *United States v. United Mine Workers,* 330 U.S. 258, 269 (1947); *Railroad Retirement Board v. Alton R.R.,* 295 U.S. 330, 344 (1935).

A. Preliminary Statement

This case, like its companion case in *BLE v. ICC, supra,* stems from conflicting interpretations which both rail labor and the railroads have given to the effect of the conditions which the ICC imposed on its order approving the Pacific Rail System, Inc.'s control over the Missouri Pacific, Union Pacific and Western Pacific railroads. *See, Union Pacific Corp.—Control,* 366 I.C.C. 459 (1982), *aff'd in part, remanded in part sub nom., Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1171 (1985). In that order, the ICC imposed the requirement that if the carriers formed the Pacific Rail System, they must grant to

the MKT, among others, the right to operate over approximately 200 miles of Missouri Pacific tracks from the MKT's most northern point—Kansas City, Missouri—to both Lincoln and Omaha, Nebraska, and then into Council Bluffs, Iowa on the Union Pacific's tracks. 366 I.C.C. at 570. The ICC also conditioned its control approval, and its grant of trackage rights, by imposing the requirement that all of the involved carriers agree to comply with various provisions designed to protect the interests of rail employees who might be affected by any action taken to modify rail operations as a result of the ICC approvals of the financial transactions at issue. 366 I.C.C. at 654, ¶ 17, 19. The work stoppage at issue in this case is the result of the Missouri Pacific's and MKT's insistence that the trackage rights authorization superseded the Railway Labor Act, the contractual rights of Missouri Pacific employees represented by the UTU, and the employee protective provisions imposed by the ICC.

Article 1, Section 2 of the two different employee protective arrangements imposed in this case,[2] provides that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

E.g., Norfolk & Western Ry.—Trackage Rights, supra, note 2, 354 I.C.C. at 610. The employee protective arrangements

[2] The Commission imposed the *New York Dock* conditions upon the applicants for the protection of Missouri Pacific employees, among others, and it imposed the *Norfolk & Western* conditions upon the carriers involved in the trackage right transactions. *See*, UTU Cross-Petition in No. 85-983 at 4-5. The principal difference between the two sets of conditions, as explained in note 3, *infra*, is the notice provision.

imposed upon the MKT's trackage rights provided in Article 1, Section 4 that:

> When the railroads contemplate a transaction [which Art. 1, § 1(a) defines as an "acquisition by a railroad of trackage rights over . . . any railroad line or lines owned or operated by any other railroad"], they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notices to the representatives of such interested employees. . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. *Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.* . . .

Norfolk & Western Ry.—Trackage Rights, supra, note 2, 354 I.C.C. at 610-11 (emphasis added).[3]

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[3] The *New York Dock* conditions' notice provision is different from the *Norfolk & Western's* in two respects. First, the *New York Dock* conditions require 90 days advance notice and, second, *New York Dock* provides that: "No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered." *New York Dock* conditions, Art. 1, § 4(b), 360 I.C.C. at 85. *See, Railway Labor Executives' Assoc. v. United States,* 675 F.2d 1248, 1253 (D.C. Cir. 1982).

Shortly after the ICC served its order in late October 1982, the MKT, Missouri Pacific and Union Pacific railroads entered into an agreement dated November 9, 1982, which reflected their agreement in principle on the terms and conditions for the grant of trackage rights to the MKT. Certified Record in court of appeals [hereinafter, "C.R."] at 24. That interim agreement provided that: "The parties will enter into a standard form trackage rights agreement to implement MKT's trackage rights." *Id.* In March 1983, the carriers filed their formal trackage rights agreement with the ICC and in Section 5(B) of that agreement stated that: "Tenant [MKT] shall, with its own employees and at its sole cost and expense, operate its trains, locomotives and cars over the Joint Track, subject, however, to such rules, timetables, regulations and orders as Pacific [*i.e.*, Missouri Pacific and Union Pacific] may issue from time to time." *Id.*

MKT's crew selection provision was consistent with the position which that railroad had taken before the ICC in support of its request for trackage rights conditions, for in its evidence which it presented to show the feasibility of its proposed conditions, the MKT assumed that it would use its own employees to operate its trains over Missouri Pacific and Union Pacific tracks. *See*, MKT Petition in No. 85-793 at 3.[4]

On December 22, 1982, the Pacific Rail System consummated its control over the various railroads and on January 6, 1983, the MKT began operating over Missouri Pacific tracks using its own employees to run those trains. C.R. at No. 24; Appendix at 6c.

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[4] Respondent MKT has alleged throughout this case that rail labor did not challenge its proposal to use its own employees while the trackage rights issue was before the ICC. *E.g.*, MKT Petition in No. 85-793 at 3. That allegation is incorrect, for rail labor asked the ICC to impose employee protective conditions if the Commission approved the trackage rights request; the employee protective conditions proposed by rail labor contained the same preservation of rights, notice and negotiation provisions as subsequently imposed in the *New York Dock* conditions. *See*, Certified Index before D.C. Cir. in *BLE v. ICC*, *supra*, at F.D. No. 30,000 (Sub-No. 20, *et al.*) at 4.

B. Impact of Trackage Rights Operations On Missouri Pacific Employees

Shortly before the MKT began operating over Missouri Pacific lines, the Missouri Pacific sent a letter to the UTU General Chairmen on that railroad dated December 31, 1982, advising them that the MKT "will commence operations between Kansas City, Missouri, and Omaha and Lincoln, Nebraska, on January 3, 1983." C.R. No. 24. Petitioner Newcomb, one of the UTU General Chairmen on the Missouri Pacific, responded in a letter dated January 4, 1983, stating that:

> The . . . [MKT] has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected [*i.e.*, performed] by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

Appendix at 5c-6c. The Missouri Pacific did not respond in writing to that letter, but met with the UTU on several occasions between January 4, 1983 and March 7, 1983 to discuss the UTU's concerns. *See*, Appendix at 8c; C.R. at 85. In the meantime, however, the MKT commenced its operations over the Missouri Pacific on January 6, 1983. *Id.* at 6c.

During the conferences which resulted from the January 4, 1983 letter, the UTU asked the Missouri Pacific to negotiate with it "regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perform work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU." C.R. at 85. Respondent Missouri Pacific, however, refused to negotiate on either issue because, in

its opinion, the ICC's order required it to grant trackage rights to MKT and it had no right to negotiate about either the selection of forces to staff the MKT operations or the impact of that transfer on Missouri Pacific-UTU employees. *Id.*

More than ten (10) days after the last conference was held, and after neither party requested the services of the National Mediation Board (*see,* 45 U.S.C. § 156), petitioners UTU, *et al.*, informed the Missouri Pacific as follows in a mailgram dated March 28, 1983 (C.R. at 11):

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (Proper) have exhausted our patience and goodwill in attempting to have your stop the use of MKT employees manning freight trains over Missouri Pacific lines between Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our Committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 a.m. April the 4th 1983.

In response to that message, the Missouri Pacific filed a complaint against petitioners on March 30, 1983, in the United States District Court for the Eastern District of Missouri requesting that the Court enjoin petitioners and UTU members from striking or otherwise failing to report for work. C.R. at 1-6. The court granted the Missouri Pacific a Temporary Restraining Order on March 30, 1983, and that interlocutory order was extended by consent until February 7, 1984, when, after the parties had filed cross motions for summary judgment, the court issued a preliminary injunction.[5] That injunction was made permanent on March 30, 1984. Appendix at 1d.

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[5] Respondent MKT moved to intervene as a plaintiff in April 1983 and that request was granted on May 6, 1983. Petitioner UTU filed a counterclaim on May 20, 1983, seeking to enforce the Railway Labor Act and Article 1, Section 4 of the employee protective conditions. C.R. at 31-19.

Another labor organization, the Brotherhood of Locomotive Engineers, which represented the Engineers on the Missouri Pacific, filed a petition with the ICC to clarify the effect of the ICC's order. That petition, along with the subsequent requests by the Engineers and the UTU to reconsider, led to the ICC orders which were vacated by the District of Columbia Circuit in *BLE v. ICC, supra.* However, those orders were relied upon by the district court in this case to deny petitioners' counterclaim and to grant injunctive relief to respondents Missouri Pacific and MKT.[6]

C. Rulings By District Court

On March 1, 1984, the district court issued a Memorandum which set forth its rulings which were subsequently incorporated into the permanent injunction. In that Memorandum, the court first examined and rejected petitioners arguments that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprived the federal courts of jurisdiction to grant injunctive relief to restrain the work stoppage threatened by the UTU. Although it recognized that there was a factual dispute over whether the controversy between the Missouri Pacific and the UTU could be characterized as a "major" or a "minor" dispute,[7] the court resolved that factual dispute on the summary judgment motions because it believed that the UTU's mailgram

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[6] On October 19, 1983, petitioner UTU asked the district court to refer two issues raised by the Counterclaim to the ICC, but the Court denied that motion because, in the Court's opinion, the ICC's decision of October 19, 1983, had resolved both issues. *See,* Appexndix at 31c-34c. Petitioner agreed that one issue—whether the ICC intended its 1982 Order to supersede Railway Labor Act rights—had been decided by the ICC's October 1983 Order, but the UTU asserted that the second issue—whether the employee protective provisions required MKT and the Missouri Pacific to give advance notice to Missouri Pacific-UTU employees, and to negotiate an agreement with those employees—had not been resolved. Petitioner UTU raised the failure to refer the second issue on its appeal to the Eighth Circuit, but it is not asking this Court to resolve that referral issue by this Petition.

[7] Under the Railway Labor Act, a "major" dispute is one involving changes to existing rates of pay, rules or working conditions, whereas a "minor" dispute is one dealing with interpretations of existing agreements to

(footnote continued)

was the best evidence of the controversy between the parties. That mailgram, the court found, revealed that the UTU was concerned that its current agreements and seniority rights were being violated by the MKT's operations; in the court's opinion, this finding of fact led to the conclusion that the controversy was a minor dispute because "the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties." Appendix at 17c. Consequently, according to the district court, the Norris-LaGuardia Act did not bar injunctive relief. *Id.* at 16c-17c.

Petitioners argument that Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. § 152, Seventh and 156, prohibited unilateral changes in existing working conditions and thus removed this controversy from the "minor" dispute category, was rejected by the court. Relying upon the ICC's orders denying the Engineers' and UTU's petitions seeking to clarify the 1982 Order, the court concluded that: "[T]he ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under § 152, Seventh and § 156, at least with respect to the crewing provisions of the trackage rights agreement." *Id.* at 19c. That exemption, the court stated, came from 49 U.S.C. § 11341(a) which was "self-executing" and, since the ICC had "twice made it clear [in the two orders which were subsequently vacated by the *BLE v. ICC*] that MOPAC and [MKT] . . . are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement" (Appendix at 19c), there was no need to make a *de novo* determination of necessity here, as petitioner had asked be done. *Id.* at 20c. According to the district court: "To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Court of

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(footnote continues)

ascertain their meaning. This distinction is important because minor disputes not settled after conferences may be resolved only by adjustment boards, whereas a party may not be compelled to arbitrate a major dispute. *See, Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945); 45 U.S.C. § 157, First.

Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC." *Id.* The court then added that, "to the extent that *Texas* [*& New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963)] . . . stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition." *Id.*

Petitioners UTU, *et al.*, then argued that even if this dispute could be termed a "minor" dispute, the Norris-LaGuardia Act should not be displaced by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. Petitioners asserted that if respondent Missouri Pacific has been relieved of its obligations under the Railway Labor Act to honor its contracts with the UTU, there is no contract interpretation issue to be submitted to an adjustment board and, thus, there is no justification for accommodating the Railway Labor Act to the Norris-LaGuardia Act under *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). This argument was also rejected by the district court because:

> The [*Chicago River*] rationale is not absent, because the ICA provides "a process for a final decision," . . . and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In [*Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963)] . . . , the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. . . . Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the [Adjustment Boards] . . . is displaced. Just as the NLGA is excepted to enforce the labor

> jurisdiction of the [Adjustment Boards] . . . , in this case the NLGA is excepted to enforce the labor jurisdictions of the ICC.

Appendix at 21c (footnote omitted).

Although it concluded that the controversy was a "minor" dispute, the court added that:

> This Court finds it necessary to rest the Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an alternative basis: Even if this is a "minor" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

Appendix at 21c. In reaching that conclusion, the court acknowledged that its ruling was contrary to the Fifth Circuit's decision in *Texas & New Orleans, supra.* Nevertheless, the court stated that it "disagree[d] with the result reached in *Texas & New Orleans Railway Co.*" (Appendix at 25c) because "it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent." *Id.* at 26c.

Finally, the district court observed that there was "*dicta* in various Supreme Court decisions [which] indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called 'labor legislation'." Appendix at 28c. Relying upon the assertion that "the ICC has jurisdiction over labor disputes in connection with consolidation proceedings," the court concluded that: "Here, the NLGA must be accommodated to the ICA in order to preserve the obvious

purpose of giving the ICC jurisdiction over railroad consolidation proceedings." *Id.*[8]

After that decision was issued,[9] the parties conferred as required by the court's order (Appendix at 35c-36c) and presented the court with executed stipulations and a Joint Statement which stated that, in light of the court's conclusions of law, a trial was unnecessary. Petitioners UTU, *et al.*, noted in the Joint Statement that although there was a factual dispute over whether the strike threat was premised in part on a major or a minor dispute, petitioners recognized that a favorable finding on that factual dispute would not result in a judgment in their favor because of the court's alternative conclusion that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act, regardless of whether the dispute is major or minor. Joint Statement at 2-3.

Petitioners then asked the court to modify the injunction it was planning to issue to clarify the scope of the injunction and to eliminate any restraint upon individual employees. While the court granted the first request, it rejected the second which was premised on the Thirteenth Amendment to the Constitution of the United States and on Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, which provides in pertinent part that: "[N]o court [shall] issue any process to compel the performance by an individual employee of such labor or service, without his consent." According to the district court, "the analysis which this court utilized to find that the ICC exempted plaintiffs [Missouri Pacific and MKT] from the requirements of the RLA applies here to exempt the [carriers from the provisions of Section 2, Tenth quoted above] . . . ."

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[8] The court also rejected petitioners' argument that Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, prohibited an injunction. Since the ICC "conclusively determined the dispute in the case at bar" (Appendix at 29c), Missouri Pacific had no obligation to negotiate and, thus, Section 8 did not bar an injunction.

[9] Petitioners appealed from that preliminary injunction order to the Eighth Circuit, but moved to dismiss that appeal after the district court issued its permanent injunction.

Appendix at 3b. Petitioners' Thirteenth Amendment argument was rejected because: "The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of matters in dispute in this litigation." *id.* The court then issued an injunction which permanently enjoined UTU members on the Missouri Pacific from, among other acts, "failing or refusing to report for work in accordance with" the agreements on that carrier. Appendix at 2d.

Petitioners filed a timely notice of appeal to the Eighth Circuit; that appeal has been fully briefed, and was argued on January 14, 1985. Shortly after the District of Columbia Circuit issued its decsion in *BLE v. ICC*, the Commission sought leave to intervene in the Eighth Circuit case to explain why that court should not accept the *BLE* decision. On June 21, 1985, the court granted the ICC's request to intervene. Because of the relationship of this case to the decision in *BLE v. ICC, supra,* petitioners are asking this Court to issue a writ of certiorari to the Eighth Circuit to review this case, if this Court grants the requests for a writ of certiorari to review the decision in *BLE v. ICC.*

REASONS FOR GRANTING THE WRIT

I. This Petition Before Judgment Raises Issues Which Are Correlative To The Issues Raised By the Petitions To Review The Decision In *BLE v. ICC* And Are Important To The Orderly Administration Of The Interstate Commerce Act And The Railway Labor Act

Respondents ICC, MKT and Missouri Pacific have all asked this Court to accept for review the District of Columbia Circuit's decsion in *BLE v. ICC* because, in their opinion, that decision will be used by rail labor to block consolidations and other financial transactions which the ICC has found to be in

the public interest. *E.g.*, ICC Petition in No. 85-792 at 16. Indeed, the Association of American Railroads [hereinafter, "AAR"] has filed a brief as an *Amicus Curiae* urging that the *BLE v. ICC* decision be reviewed because, in its opinion, "[t]he role of the [Railway Labor Act] . . . in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today." AAR Br. at 17. While rail labor agrees that the *BLE v. ICC* case should be reviewed by this Court (*see*, UTU Cross-Petition in No. 85-983 at 16), Petitioners UTU, *et al.*, respectfully submit that a full resolution of the problems perceived by respondents and by the AAR cannot be achieved unless this Court also reviews the Eighth Circuit case along with the *BLE v. ICC* decision.

As their pleadings to this Court make clear, respondents and the AAR are asking this Court to declare upon its review of the *BLE v. ICC* case that rail labor does not have a right to negotiate or to use economic self-help to protect their employment interests once the ICC has issued an order permitting rail carriers to consolidate, merge, or take other financial actions. Such a far reaching declaration, however, does not necessarily flow from a review of the District of Columbia Circuit's decision because that case, even as viewed by rail labor's cross petitions, does not address all of the questions arising out of labor's constitutionally grounded right to associate together and to use their collective economic powers to protect their interests. *See, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).

While the *BLE v. ICC* case as framed by rail labor does address the crucial and pivotal issue of whether the Interstate Commerce Act can be viewed as relieving railroads of Railway Labor Act or contractual obligations to their employees, an unfavorable resolution of that issue for rail labor leads into, but does not address, either rail labor's natural reaction to such an abrogation of rights—*i.e.*, a strike—or the railroads' natural response to such a strike—an injunction request.

Before respondents and the AAR may state legitimately that rail labor can be enjoined from striking over a railroad's abrogation of contractual or Railway Labor Act rights of employees because of an ICC order, the railroads have to establish three points. First, they have to show that the Interstate Commerce Act supersedes the Railway Labor Act and contractual rights of employees; that question is raised by the *BLE v. ICC* case which the entire rail industry is urging this Court to review. Second, the railroads have to establish that such a strike is prohibited by some legal obligation imposed upon employees (*but see*, Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52); the *BLE v. ICC* case does not address that issue. And third, the railroads have to establish that some Act of Congress restores to federal courts the jurisdiction to enjoin strikes which the Norris-LaGuardia Act has withdrawn. *But see, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702, 719 (1982); *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330, 335-36 (1960); *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). This third issue is also not presented by the *BLE v. ICC* case. However, the second and third issues are presented by the case pending before the Eighth Circuit.

Petitioners UTU, *et al.*, agree with respondents that it is extremely important to all connected with the rail industry—management, employees, shippers, the ICC and the public—that this Court resolve the current dispute over the impact of an ICC order on employment rights of rail employees. However, petitioners submit that in resolving this dispute, this Court should have before it a sufficient basis upon which to resolve the entire dispute and not just that half presented by the *BLE v. ICC* case.

If respondents are correct in believing that the Commission's merger orders supersede inconsistent Railway Labor Act

rights and contracts, and that a railroad may modify existing agreements unilaterally by simply including the proposed modifications in its application before the ICC, then it is inevitable that rail employees will be forced to use their collective economic powers to compel rail management to honor their employment rights. *E.g., United States v. Lowden*, 308 U.S. 225, 234-36 (1939). Indeed, the threat of such strikes has already occurred in this case and in the case cited by respondent ICC in its petition (ICC Petition at 17 n.13) involving the transfer of the properties of the Chicago, Milwaukee, St. Paul & Pacific Railroad to the Soo Line Railroad under both Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (repealed for subsequent cases) and Section 5(b) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904(b). Consequently, a full and final resolution of the current dispute over the effect of an ICC merger order on rail employees must include not only the issues raised by the *BLE v. ICC* case, but also the issues raised by petitioners' appeal presently pending before the Eighth Circuit—*i.e.*, whether a carrier's exemption from the Railway Labor Act has the effect of relieving rail labor from the restraints which that Act places on labor's right to strike, and whether the Norris-LaGuardia Act must be, and can be, accommodated to the Interstate Commerce Act.

Unfortunately, if this petition for a writ of certiorari before judgment is not granted, those questions will not be resolved completely by the Eighth Circuit for several reasons. First, if the Eighth Circuit affirms the district court's decision, there will be a conflict in the circuits between that decision and the decision by the Fifth Circuit in the *Texas & New Orleans* case as explained in Argument II, *infra*. Also, such an affirmance will result in a conflict between the Eighth Circuit and applicable decisions by this Court which have held that the Noris-LaGuardia Act cannot be accommodated to non-labor statutes. *See, Order of Railroad Telegraphers v. Chicago & North Western R.R., supra*, 362 U.S. at 339 n.15 and accompanying text.

Consequently, an affirmance of the district court's decision by the Eighth Circuit will create more uncertainty, rather than resolve this problem.

Moreover, a reversal of the district court's decision on its merits by the Eighth Circuit will not resolve this problem finally, because the railroads, having been emboldened by the ICC's provincial view of the importance of its orders, will clearly continue to abrogate employment rights, purportedly authorized by an ICC order, which will force rail labor to strike; the railroads will then continue to seek injunctions in federal courts. Unfortunately, such injunctions are frequently granted, even if not warranted by law. *See*, F. Frankfurter & N. Greene, THE LABOR INJUNCTION at 222 (1930).

Petitioners respectfully submit that the answer to this uncertainty is for this Court to issue a writ of certiorari to the Eighth Circuit to review petitioners' pending appeal from the district court's decision, if this Court also decides to review the District of Columbia Circuit's decision in *BLE v. ICC*. *See generally, New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970).

II. By Concluding That It Had The Jurisdiction To Enjoin A Work Stoppage By Missouri Pacific Employees, Notwithstanding The Norris-LaGuardia Act, The District Court Has Decided An Important Question Of Law For The Railroad Industry In A Manner Which Conflicts With Applicable Decisions Of This Court And The Fifth Circuit

Relying upon respondents' assertions that the ICC's grant of Trackage Rights to the MKT had relieved the Missouri Pacific of any Railway Labor Act or contractual obligations it might have had to its employees to negotiate the crew selection issue, the district court concluded that, because the ICC had conclusively resolved the crew selection question against Missouri Pacific employees, petitioners did not have a right to strike the Missouri Pacific. Appendix at 27c. Since, in the district court's opinion, Congress "specifically intended the ICC to

authoritatively resolve labor disputes arising from rail consolidations" (Appendix at 26c), the threatened strike must be enjoined and the Norris-LaGuardia Act must be "accommodated" to the Interstate Commerce Act "in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings." Appendix at 28c. Those conclusions, petitioners respectfully submit, improperly accommodated the two Acts by subordinating the provisions of the Norris-LaGuardia Act to a non-labor statute.

Petitioners UTU, *et al.*, respectfully submit that such a subordination of labor's interests is prohibited by the Norris-LaGuardia Act, and is contrary both to applicable decisions of this Court construing that Act and to the decision of the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra.* Because of the importance of this issue to the railroad industry, petitioners request that this Court review the district court's decision, if this Court also grants the petitions in the *BLE v. ICC* case.

This Court has previously admonished federal courts that the Norris-LaGuardia Act must be construed broadly to effectuate its intent—*i.e.*, " to prevent the injunctions of federal courts from upsetting the natural interplay of the competing economic forces of labor and capital." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957); *accord, Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330, 335 (1960). As this Court observed before:

> There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. Section 2 of this Act [29 U.S.C. 102] specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; *it is one of*

> *freedom of association, organization, representation and negotiation on the part of workers.* The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against non-judicial intervention in labor disputes had been given unduly limited constructions by the courts.

Order of Railroad Telegraphers v. Chicago & North Western R.R., supra, 362 U.S. at 335-36 (footnotes omitted)(emphasis added).

In the case presently pending before the Eighth Circuit, the district court ignored those admonitions and accommodated the Norris-LaGuardia Act to an ICC order where rail labor's interests were not even considered. The resulting injunction, petitioners respectfully submit, ignored prior rulings of this Court and, contrary to the intent of the anti-injunction Act, stripped "labor of its primary weapon without substituting any reasonable alternative." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., supra,* 353 U.S. at 41 (footnote omitted).

Even if it could be asserted validly that the conduct of the union was rendered unlawful by the ICC's order (an assertion with which petitioners disagree), this Court has held before that federal courts do not have the jurisdiction to enjoin such conduct (*e.g., Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.,* 311 U.S. 91 (1940)), for "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute." *Order Railroad Telegraphers v. Chicago & North Western R.R., supra,* 362 U.S. at 339 (footnote omitted). Those rulings by this Court, the district court believed, were merely *dicta* and were not controlling here because, even though the Interstate Commerce Act "was not enacted 'as a part of a pattern of labor legislation,' . . . the ICC has jurisdiction over labor disputes in connection with consolidation

proceedings, [and, thus,] excepting the NLGA in the case at bar does not result in a great departure from established doctrine." Appendix at 28c, *quoting, Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., supra,* 353 U.S. at 42. Contrary to the district court's belief, this case does represent a great departure from established doctrine.

In *Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* this Court addressed a railroad's assertion that a strike could be enjoined, regardless of the Norris-LaGuardia Act, when the strike was in support of an attempt by rail labor to bargain about operational changes which required prior regulatory agency approval. That argument is clearly relevant to the case at bar, and it was rejected by this Court because, after noting the rationale for the accommodation effected by the *Chicago River* case, the Court concluded that the *Chicago River* exception did not justify enjoining rail labor's bargaining efforts in that case. As the Court stated:

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." . . . Moreover, neither the [railroad] . . . nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement. It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.

Order of Railroad Telegraphers v. Chicago & North Western R.R., supra, 362 U.S. at 339-40 (footnote omitted).

Even though that reasoning seriously questions the validity of an accommodation of the Norris-LaGuardia Act to an ICC order, the district court nevertheless disregarded the teachings of the *Railroad Telegraphers* case because the district court believed that the decision was inapposite to the case at bar which, unlike the *Telegraphers* case, involved an ICC order that, in the court's opinion, would be violated by the UTU's bargaining demands. Appendix at 24c n.9. More important, however, the district court did not follow the clear command of that case that the Norris-LaGuardia Act may not be disregarded where the conflicting law does not address the same concerns protected by the anti-injunction statute (*i.e.*, the balancing of labor's and capital's economic bargaining powers). Indeed, the district court totally ignored that essential element of the *Telegraphers* case.

In the *Texas & New Orleans* case, the Fifth Circuit was faced with a factual situation clearly analogous to the case at bar, but that court reached a result which the district court in this case acknowledged was in direct conflict with the injunction issued against petitioners. In the *Texas & New Orleans* case, the court addressed a request by railroads to enjoin a strike which a union had called in response to both the railroads' refusal to bargain and the unilateral changes which the railroads asserted were authorized by an order of the ICC. As the Fifth Circuit observed, the railroads were contending that "section 5(2)(f) of the Interstate Commerce Act [recodified as 49 U.S.C. § 11347] . . . is also part of the national pattern of labor legislation and that an injunction is necessary to carry out its provisions." 307 F.2d at 157. In rejecting that assertion, the court first reviewed this Court's admonitions concerning the reach of the Norris-LaGuardia Act, and then refused to "ac-

commodate"—*i.e.*, ignore—the anti-injunction Act because (307 F.2d at 158):

> The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Although under respondents' view of the ICC order at issue in this case, rail labor has no voice whatsoever in the crew selection process, the district court refused to follow the Fifth Circuit's decision because, in the district court's opinion, the *Texas & New Orleans* court had not properly weighed the interests behind the Interstate Commerce Act with rail labor interests. Appendix at 25c-27c. Unfortunately, in proceeding to weigh those interests, the district court did precisely what the Norris-LaGuardia Act sought to avoid—*i.e.* allowing courts to balance social-economic interests in an injunction request—based on a conclusion by Congress that experience had shown conclusively that "economic sympathies and prepossessions [of the judiciary] may unwittingly foreclose the solution of these issues." F.Frankfurter & N. Greene, THE LABOR INJUNCTION, *supra*, at 132; *see also, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, *supra*, 457 U.S. at 719-20. Section 4 of the Norris-LaGuardia Act (by removing all equity jurisdiction to enjoin peaceful strikes, whether legal or illegal) was intended to prevent the federal courts from engaging in such social-economic balances; rather, that balancing feat was to be left to Congress. *Id.* at 219; *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, *supra*, 362 U.S. at 342.

Petitioners UTU, *et al.*, respectfully submit that, as shown in Argument I, *supra*, this question is too important to the rail industry and to the public to be left in doubt. Petitioners,

therefore, respectfully request that this Court accept this case for review, if it accepts for the review the *BLE v. ICC* case.[10]

CONCLUSION

For the reasons set forth herein, petitioners UTU, *et al.* respectfully ask that the writ be issued as requested if this Court also accepts for review the decision of the District of Columbia Circuit in *BLE v. ICC.*

Respectfully submitted,

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Date: December 18, 1985

[10] Petitioners also challenged the scope of the district court's injunction which restrained individual Missouri Pacific-UTU employees from failing to report for work, or from otherwise failing to work as required by their contract. Petitioners submit that their challenge raises important issues under the Thirteenth Amendment to the Constitution of the United States, under Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, and under Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52. Petitioners have included that question in this petition.

APPENDIX A

Statutes Relied Upon:

1. SECTION 20, CLAYTON ANTI-TRUST ACT, 29 U.S.C. § 52
2. NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101, *et seq.*
   A. Section 4, 29 U.S.C. § 104
   B. Section 8, 29 U.S.C. § 108
   C. Section 13(c), 29 U.S.C. § 113(c)
3. INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, *et seq.*
   A. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. § 11341(a), as amended.
   B. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347
4. RAILWAY LABOR ACT, 45 U.S.C. § 151, *et seq.*
   A. Section 2, First, 45 U.S.C. § 152, First
   B. Section 2, Seventh, 45 U.S.C. § 152, Seventh
   C. Section 2, Tenth, 45 U.S.C. § 152, Tenth
   D. Section 6, 45 U.S.C. § 156
   E. Section 7, First, 45 U.S.C. § 157, First

APPENDIX A:

STATUTES RELIED UPON:

SECTION 20, CLAYTON ANTI-TRUST ACT, 29 U.S.C. § 52

§ 52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101, *et seq.*

A. Section 4, 29 U.S.C. § 104:

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

B. Section 8, 29 U.S.C. § 108:

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

C. Section 13(c), 29 U.S.C. §113(c):

Sec. 13. When used in this act, and for the purposes of this act—

* * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

INTERSTATE COMMERCE ACT, 49 U.S.C. §10101, *et seq.*

A. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. §11341(a), as amended.

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or

exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

B. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347

§ 11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the

transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

RAILWAY LABOR ACT, 45 U.S.C. § 151, *et seq.*

A. Section 2, First, 45 U.S.C. § 152, First:

§ 152. General duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2, Seventh, 45 U.S.C. § 152, Seventh:

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 2, Tenth, 45 U.S.C. § 152, Tenth:

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of

the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

D. Section 6, 45 U.S.C. § 156

§ 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proferred its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after

termination of conferences without request for or proffer of the services of the Mediation Board.

E. Section 7, First, 45 U.S.C. § 157, First

§ 157. Arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

MEMORANDUM

This case is now before this Court on the request of the parties that the preliminary injunction entered by this Court on February 7, 1984, be made permanent. A trial on the merits was held by consent on March 16, 1984. The record was stipulated to consist of the following: 1) a "Joint Statement of Compliance With The Court's Order of March 1, 1984" (hereinafter "Joint Statement"), which is signed by counsel for all parties; 2) a bound set of "Stipulations" and documents, filed on March 9, 1984; 3) a set of "Supplemental Stipulations" and documents, filed on March 9, 1984; 4) the preliminary injunction entered by this Court on February 7, 1984; and 5) the Memorandum filed by this Court on March 1, 1984.

The Joint Statement sets out the parties' view that "there are no factual or legal issues yet to be resolved, and . . . the Court can and should make permanent the preliminary injunction issued herein." *Joint Statement* at 2,¶2. The Joint Statement further provides that "all parties agree that no further evidence or argument is necessary with regard to the causes of action raised in plaintiffs' complaints." *Id.* at 2-3, ¶2.

This Court accepts the Joint Statement of the parties and the representations contained therein. This Court's Memorandum of March 1, 1984, resolved the legal issues in this case in favor of plaintiffs and there are no genuine issues of material fact. Accordingly, judgment in favor of plaintiffs is appropriate and the preliminary injunction entered by this Court on February 7, 1984, is made permanent, as modified by the Order entered this day.

At the "trial" on March 16, 1984, defendants raised two (2) additional matters that must be dealt with. First, defendants pointed out that the scope of the injunction entered on February 7, 1984, did not contain any limitation as to the particular type of activity that was enjoined. That injunction can be construed as prohibiting strikes and other similar activity for any reason whatsoever. The Permanent Injunction entered this day adds a clause to the preliminary injunction, which corrects this deficiency. As modified, the intent of this Court to enjoin the prohibited activity only as it relates to the matters in dispute in this litigation is made clear. The parties consent to this modification.

The second point raised by defendants was a request to strike out certain language in the injunction. Specifically, defendants moved to strike the phrase "all classes of employees represented by defendants" and the word "members" in the first three (3) lines of the second paragraph of the February 7, 1984, injunction. Defendants argue that the existence of this language in the injunction violates 45 U.S.C. § 152, Tenth, and

the thirteenth amendment to the United States Constitution. *U.S. Const., amend. XIII.* This Court rejects both arguments. As to 45 U.S.C. § 152, Tenth, it is the opinion of this Court that the analysis which this Court utilized to find that the ICC exempted plaintiffs from the requirements of the RLA applies here to exempt the proviso in 45 U.S.C. § 152, Tenth. *See Memorandum of March 1, 1984* at 16-17, 18-19. If the injunction does not apply to plaintiffs' employees or defendants' members, plaintiffs are without protection from "wildcat" strikes. Plaintiffs' employees and defendants' members could thereby frustrate the power of the ICC over labor disputes in trackage rights proceedings.

Defendants' thirteenth amendment argument must also be rejected. The thirteenth amendment prohibits involuntary servitude. The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez,* 686 F.2d 334, 345-46 (5th Cir. 1982); *New Orleans Steamship Assn. v. General Longshore Workers,* 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assn.,* ____U.S.____, 102 S.Ct. 2673 (1982).

Accordingly, defendants' request to strike certain language from the injunction be and is denied.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

No. 83-771C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 1, 1984]

MEMORANDUM

This case is now before this Court on the motion of plaintiff Missouri Pacific Railroad Company (hereinafter "MOPAC") and intervenor-plaintiff Missouri-Kansas-Texas Railroad Company (hereinafter "KATY") for a preliminary injunction enjoining defendants and their members from striking either railroad.[1] In addition, there are several other motions which are now pending before this Court. These include: 1) defendants' motion to refer two (2) issues to the Interstate

[1] On February 7, 1984, this Court granted plaintiffs' motion for a preliminary injunction. At that time this Court issued a very brief memorandum which stated in summary fashion the reasons for granting plaintiffs' motion. This Court indicated that a more complete and detailed explanation of this Court's ruling would be forthcoming. The memorandum filed herein this day is the memorandum promised. However, in addition to discussing plaintiffs' motion for a preliminary injunction, this memorandum addresses the pending motions for referral to the Interstate Commerce Commission and for summary judgment.

Commerce Commission pursuant to 28 U.S.C. § 1336(b); 2) plaintiffs' motions for summary judgment on its complaint and dismissal of or summary judgment on defendants' counterclaims; and 3) defendants' cross-motion for summary judgment on plaintiffs' complaint.

I MOTION FOR PRELIMINARY INJUNCTION

The motion for a preliminary injunction was submitted to this Court on a stipulated record consisting of the following: 1) a stipulation of fact[2]; 2) the affidavit of Irving Newcomb which, *inter alia*, attests to the accuracy of the facts stated in defendants' (hereinafter "UTU") "Statement of Facts" contained in *Memorandum of Defendants in Support of Their Cross-Motion To Dismiss, etc.* at 2-12; and 3) the affidavit of O.B. Sayers which, *inter alia*, attests to the accuracy of the facts stated in plaintiff MOPAC's "Background Facts" contained in *Memorandum of Plaintiff Missouri Pacific Railroad Company In Support of Its Motions etc.* at 4-8. In addition, this Court takes judicial notice of the orders of the Interstate Commerce Commission (hereinafter "ICC") entered in connection with the application of MOPAC to consolidate with the Union Pacific Railroad Company (hereinafter "UPRR"). *Fed.R.Ev.* 201. This Court, having considered the record in this case, the pleadings, briefs and exhibits submitted in support of and in

[2] The manner in which the parties developed the record for this motion was poor to say the least. As stated in this Court's *Memorandum* dated February 7, 1984, the parties stipulated to a record in this case during an in-chambers conference, held on-the-record, on February 1, 1984. It was represented that a so-called "Stipulation of Fact" existed and had been filed along with the parties' pre-trial material. The file contained a document captioned "Stipulations", which had been filed by plaintiffs, and it contained the signatures of counsel for MOPAC and KATY only. It did not contain the signature of any representative of UTU. It was not until February 6, 1984, that this Court received and filed a copy of the "Stipulations" with a signature of counsel for UTU on it. However, even this document does not contain the signature of KATY's counsel. This Court assumes that, given the fact that counsel for KATY's signature appears on a copy of this document elsewhere in the file, it is a valid and binding stipulation of fact.

opposition to the motion for a preliminary injunction, hereby makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. Plaintiff MOPAC is a common carrier regulated by the Interstate Commerce Commission ("ICC"). MOPAC offers rail freight transportation over 11,500 miles of railroad; its principal north-south lines extend to Louisiana and Texas from Chicago via St. Louis and from Omaha via Kansas City.[3]

2. Intervenor KATY is a common carrier regulated by the ICC. KATY offers rail freight transportation over 2,100 miles of railroad; its major lines serve San Antonio, Houston and Galveston. Until January, 1983, the northern-most points served by KATY were St. Louis and Kansas City.

3. Defendant UTU is a railway labor organization duly authorized, under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to represent certain employees of MOPAC and KATY who are members of the crafts or classes of conductors, brakemen, yardmen, firemen, hostlers and helpers. All other defendants are agents and officials of UTU and/or the General Committee of Adjustment for MOPAC.

4. MOPAC has several agreements with UTU that govern certain rates of pay, rules and working conditions of UTU members employed by MOPAC. One agreement, last rewritten December 1, 1982, applies to the crafts or classes of locomotive firemen, hostlers and hostler helpers; a second agreement, last rewritten September 1, 1979, applies to the crafts or classes of conductors, trainmen and yardmen.

5. On September 15, 1980, UPRR and MOPAC submitted to the ICC applications for approval of their proposed consoli-

[3] Paragraphs 1 through 13 of these "Findings of Fact" are substantially verbatim portions of the "Stipulation" signed by the parties. MOPAC is sometimes referred to as "MPRR" or "MP" and KATY is sometimes referred to as "MKT".

dation. These applications were submitted pursuant to the Interstate Commerce Act, 49 U.S.C. § 11344. From March, 1981, until January, 1982, the ICC held extensive hearings on these applications.

6. UTU participated in the ICC proceedings, opposing the applications and seeking conditions that would protect railroad employees affected by the transportations. KATY participated in the proceedings and opposed the consolidation; alternatively, if the consolidation were approved, KATY sought "trackage rights" that would allow it to operate over MOPAC tracks between, among other points, Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *See* ICC Finance Docket 30,000 (Sub-No. 25). MOPAC opposed the trackage rights condition sought by KATY. The trackage rights application of KATY was filed in January of 1981 and the proposed trackage rights agreement included therein provided: "MKT, with its own employees, at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track." *See* F.D. No. 30,000 (Sub-No. 8) *et al* (October 19, 1983), at 8 (emphasis added).

7. By decision and order dated October 20, 1982, the ICC approved the consolidation of UPRR and MOPAC, as well as the application of KATY for trackage rights, over MOPAC lines between Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *Union Pacific Corp., et al.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459, 642, 653 (1982); *pet. for rev. pending*, D.C. Cir. Nos. 82-2253, *et al.* The ICC's Order provided that the trackage rights, which it concluded were necessary to ameliorate competitive effects of the approved consolidation, would be effective immediately upon consummation of the consolidation. The ICC's Order did not specify compensation terms, but allowed the parties to nego-

tiate such terms. In a recent decision of the ICC, Finance Docket No. 30,000 (Sub-No. 25), the ICC recognized that it has plenary authority to impose such trackage rights under the Interstate Commerce Act, 49 U.S.C. § 11341, *et seq.*

8. The ICC's Order approving the trackage rights requested by KATY in F.D. 30,000 (Sub-No. 25) provided that the trackage authority was "subject to employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.-Trackage Rights-BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate,* 360 I.C.C. 653, 664 (1980)." 366 I.C.C. at 654 (¶ 19). These conditions are commonly referred to in the railroad industry as the "Norfolk and Western" conditions (hereinafter "N&W").

9. On November 9, 1982, UPRR, MOPAC and KATY filed with the ICC a "Stipulation" reflecting their agreements in principle on the terms and conditions of the anticipated trackage rights operations (other than permanent compensation terms). The Stipulation provided that "the parties will enter into a standard form trackage rights agreement to implement KATY's trackage rights."

10. The consolidation of UPRR and MOPAC was effected on December 22, 1982. By letter dated December 31, 1982, MOPAC advised the General Chairman of UTU, among others, that KATY was expected to initiate trackage rights operations on January 3, 1983, and that "[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights . . . ." In response, R. D. Hogan of UTU sent a letter dated January 4, 1983, to O. B. Sayers of MOPAC, which stated in part:

> The Katy Railroad has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we

represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

11. On January 5, April 11 and April 13, 1983, the KATY entered into separate agreements with representatives (the UTU) of its engine and train service employees concerning the implementation of the trackage rights over MOPAC's track as authorized in Finance Docket 30,000 (Sub-No. 25).

12. KATY, using KATY employees, initiated operations over the trackage rights on or about January 6, 1983. KATY is presently using its own employees to pick-up and set-out rail cars at Atchison and Union, Nebraska and at Council Bluffs, Iowa.

13. The formal terms and conditions (other than the terms of the compensation owed MOPAC for KATY's trackage rights) are set forth in a standard form trackage rights agreement filed with the ICC March 9, 1983 ("the Trackage Rights Agreement"). The Trackage Rights Agreement recognizes that KATY "shall, with its own employees, at its sole cost and expense, operate its trains, locomotives and cars over" MOPAC's Omaha-Kansas City line.

14. By Mailgram dated March 28, 1983, and directed to MOPAC, UTU officials Newcomb and Hogan stated, as follows:

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (proper) have exhausted our patience and goodwill in attempting to have you stop the use of MKT employees manning freight trains over Missouri Pacific lines between

> Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 AM April the 4th 1983.

15. On March 30, 1983, MOPAC filed its complaint, against the UTU and several of its officers, under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same day this Court granted a Temporary Restraining Order prohibiting defendants from engaging in any strike or related activities against plaintiff. Thereafter, KATY intervened as a plaintiff and joined in MOPAC's request for relief. The UTU also filed a counterclaim against MOPAC and KATY alleging, in two (2) counts, that MOPAC violated the Railway Labor Act and that MOPAC and KATY violated the terms of the ICC's Order approving the application of KATY for trackage rights. The Temporary Restraining Order was extended beyond the ten (10) day limit of Rule 65(b), *Fed.R.Civ.P.* 65(b), several times by agreement of the parties. The last such extension expired at 10:00 A.M. on February 7, 1984.

16. MOPAC has numerous trackage rights arrangements whereby other carriers, including KATY, operate over its lines and whereby MOPAC operates over the lines of other carriers, including KATY.

17. Article 1, § 4 of the N&W conditions provides, in pertinent part, as follows:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction . . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the [N&W conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

354 I.C.C. at 610-611. With respect to KATY's trackage rights over MOPAC lines, neither MOPAC nor KATY gave the notice called for by Art. I, § 4, to MOPAC employees. However, several conferences concerning the grant of trackage rights to KATY were held between, *inter alia*, Irving Newcomb for UTU and O. B. Sayers for MOPAC. These conferences occurred between January 4, 1983, and March 28, 1983. According to Mr. Newcomb, at a conference held on March 7, 1983:

> [T]he UTU requested MoPac to negotiate with the UTU regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perform work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU.

Aff. of I. Newcomb, ¶ 3. Mr. Newcomb states that MOPAC refused this request, relying upon actions and orders of the ICC. *Id.*

18. On May 12, 1983, the ICC issued a decision denying the petition of the Brotherhood of Locomotive Engineers (hereinafter "BLE") for clarification of the ICC's decision approving the consolidation of UPRR and MOPAC. F.D. No. 30,000 (Sub-No. 18) *et al.* (May 12, 1983). The ICC summarized the position of BLE, as follows:

> BLE seeks to have the consolidation decision clarified with respect to whether MKT . . . may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT . . . to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

Id. at 2-3. In denying BLE's petition the ICC stated:

> Inasmuch as . . . MKT proposed in [its] applications that the operations would be performed with [its] own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.

Id. at 4. Moreover, the ICC added:

> We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews.

Id. at 5.

19. On June 16, 1983, UTU sent a letter to several carriers, including MOPAC and KATY, requesting that those carriers "comply fully with [the] advance notice and negotiation requirements" of Art. I, § 4 of the N&W conditions.

20. MOPAC rejected UTU's request in a letter dated June 23, 1983. MOPAC interpreted UTU's letter as a request to enter into negotiations aimed at reaching a "single implementing agreement" with respect to the selection of forces for trackage rights tenants. MOPAC, relying on the May 18, 1983, order of the ICC which "confirm[ed] the inability of MPRR and UPRR to bind their trackage rights tenants to an agreement regarding selection of forces", stated that "it would be inappropriate and unproductive for MPRR and UPRR to participate in" a meeting or negotiations aimed at reaching such an agreement. However, MOPAC's letter did express a willingness to negotiate with UTU "issues of mutual interest arising from the recently approved consolidations . . . ."

21. KATY responded to the UTU in a letter dated June 22, 1983. KATY also rejected the UTU's request, relying on the ICC's orders and the fact that it had already met and negotiated implementing agreements with its own employees who are represented by the UTU.

22. On June 29, 1983, the UTU filed a pleading with the ICC which sought reconsideration of the ICC's May 18, 1983, denial of the petition for reconsideration. In that pleading the UTU asked the ICC to rule:

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective pro-

visions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

23. The ICC rejected *all three* of the UTU's arguments in a decision dated October 19, 1983. F.D. No. 30,000 (Sub-No. 18) *et al.* (October 19, 1983). The ICC stated:

> Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Id. at 4-5. The ICC further concluded that:

> Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

24. The strike threatened by UTU will cause a disruption of service to MOPAC and its shippers, and result in severe, immediate and irreparable injury to MOPAC. MOPAC, which operates over 3,400 trains per week, carrying 2,300,000 tons of freight, would be placed in serious jeopardy by the threatened strike. The injury to MOPAC's thousands of shippers, especially those exclusively served by MOPAC, would be irreparable. *Aff. of O.B. Sayers,* ¶ *4.*

B. CONCLUSIONS OF LAW

1. INTRODUCTION

This action arises under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331(a) and 1337.

Plaintiff and plaintiff-intervenor's complaints seek preliminary and permanent injunctive relief against defendants' threatened strike. Plaintiffs contend in their complaints that the dispute which gives rise to this action concerns the interpretation and application of the collective bargaining agreements between MOPAC and UTU. According to plaintiffs, the dispute is therefore a "minor" dispute within the meaning of the RLA and defendants are required by § 153 of the RLA to submit the dispute to the exclusive jurisdiction of the National Railway Adjustment Board (NRAB) rather than strike. Plaintiffs also allege that defendants' strike would violate § 152, First of the RLA, which requires carriers and employee representatives to exert every reasonable effort to settle disputes, because defendants failed to invoke the binding arbitration provisions of the employee protective conditions that were imposed by the ICC. *See Finding of Fact No. 8.* Additionally, plaintiffs contend that defendants' proposed strike action is barred by the doctrines of estoppel, collateral estoppel, and res judicata.[4]

Defendants counterclaimed for declaratory and injunctive relief. In Count I of their counterclaim defendants allege that MOPAC violated § 156 of the RLA by unilaterally changing the actual and objective working conditions of its employees,

[4] This Court declines to express an opinion as to the merits of these claims. The record on these questions is not adequate to make any findings concerning the collateral estoppel or res judicata effect of the ICC proceedings in the case at bar. The same is true of the estoppel and bar claim. Moreover, this Court's disposition of plaintiffs' other claims herein makes it unneccesary for this Court to determine these questions at this time.

i.e., by authorizing KATY to operate over MOPAC tracks with KATY crews, without complying with the notice and negotiation requirements of § 156. In Count II defendants allege that both MOPAC and KATY violated Article 1, §§ 2 and 4 of the N&W conditions imposed by the ICC, *see Finding of Fact No. 8,* by not preserving working conditions that prevailed prior to the transaction (Art. 1, § 2), and by failing to give twenty (20) days prior notice and to negotiate over the selection of forces to operate the trackage rights (Art. 1, § 4). Defendants seek an injunction requiring plaintiffs to restore the status quo that existed prior to the trackage rights transfer, prohibiting trackage rights operations until plaintiffs comply with Article 1, section 4 of the N&W conditions, and making all employees whole for their losses due to plaintiffs' alleged infractions.

Plaintiffs' motion for a preliminary injunction against defendants' proposed strike presents a unique and complex problem. The decision whether to enjoin defendants' threatened strike requires this Court to reconcile several federal statutes: 1) the Norris-LaGuardia Act (hereinafter the "NLGA"), 29 U.S.C. § 101 *et seq.;* 2) the Railway Labor Act (hereinafter the "RLA"), 45 U.S.C. § 151 *et seq.;* and 3) the Interstate Commerce Act (hereinafter the "ICA"), 49 U.S.C. § 11341 *et seq.* Essentially, defendants argue that the NLGA deprives this Court of the power to issue an injunction against defendants' threatened labor strike. Because this Court declines to read the NLGA in a vacuum, defendants' argument must be rejected. This Court will first address the NLGA problem and then will analyze the four (4) traditional criteria for determining whether preliminary injunctive relief is warranted.

2. DOES THE NORRIS-LaGUARDIA ACT BAR A LABOR INJUNCTION IN THIS CASE?

Section 104 of the NLGA provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or

> permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . .

29 U.S.C. § 104. In addition, § 108 of the NLGA provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108. Defendants contend that § 104 deprives this Court of jurisdiction to enjoin defendants' threatened strike. Alternatively, defendants argue that if this Court does have jurisdiction to enjoin defendants' threatened strike, then injunctive relief must be denied because plaintiffs have not met the requirements of § 108.

Plaintiffs respond that the underlying labor dispute is a "minor" dispute within the meaning of the RLA and, therefore, the NLGA is no bar to the power of this Court to enjoin defendants' threatened strike. Alternatively, plaintiffs argue that if the underlying labor dispute is a "major" dispute within the meaning of the RLA, then plaintiffs are exempt, under the ICA, from any duty to negotiate with defendants concerning crew selection for KATY's trackage rights and the NLGA must give way to the power and jurisdiction of the ICC in this situation. Plaintiffs do not specifically address defendants' § 108 argument.

As stated in this Court's order of February 7, 1984, and as explained more fully below, this Court holds that: 1) this is a "minor" dispute within the meaning of the RLA and, therefore, § 104 of the NLGA does not bar a labor injunction; 2) alternatively, if this is a "major" dispute within the meaning of the RLA, defendants' proposed strike would be illegal because plaintiffs have no duty to negotiate with defendants concerning crew selection for KATY's trackage rights, and § 104 of the NLGA must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and 3) § 108 of the NLGA does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. Each of these three (3) will be discussed in turn below.

a. THIS IS A "MINOR" DISPUTE AND THE NORRIS-LaGUARDIA ACT DOES NOT BAR A LABOR INJUNCTION

The RLA, which governs labor relations in the railroad industry, draws a significant distinction between "minor" disputes and "major" disputes. In an often-quoted passage, the Supreme Court described the distinction, as follows:

> [Major disputes] relate . . . to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [Minor disputes], however, contemplate . . . the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with refer-

> ence to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945). *See also Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33 (1957); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277-78 (7th Cir. 1981); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971). The distinction between the two types of disputes is significant because it affects the procedure for settling disputes and the applicability of the NLGA's prohibition against federal court labor injunctions.

If a dispute is a "minor" dispute and it cannot be resolved by the normal grievance procedure, then the parties must submit their differences to the NRAB, the jurisdiction of which is exclusive. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. For this reason, a strike over "minor" disputes violates the RLA and may be enjoined by a federal district court, the prohibitions of the NLGA notwithstanding. *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33(1963); *Chicago River*, 353 U.S. at 40-42; *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. On the other hand, "[i]f the dispute is 'major', . . . the union may strike to secure its position if after negotiation between the parties, mediation by the National Mediation Board, and, possibly, a review and report by an emergency board appointed by the President, a settlement is not reached." *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. *See also Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Strikes over "minor" disputes may be enjoined despite the NLGA, because such strikes violate the mandate of the RLA

that such disputes be conclusively resolved through the NRAB machinery created by the RLA. In *Chicago River* the Supreme Court held that the earlier and general provisions of the NLGA must be accommodated to the later and more specific provisions of the RLA. 353 U.S. at 40-42. The Court also explained that the NLGA prevents the issuance of an injunction against a railway labor strike over a "major" dispute, because the RLA "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Id.* at 42n.24.

In the case at bar the underlying labor dispute is a "minor" dispute. The essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract," or whether the dispute is "over the meaning of an existing collective bargaining agreement." *Id.* Here, the strike threat mailgram from UTU is the best indication that the dispute is the latter rather than the former. UTU's mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." *Finding of Fact No. 14.* UTU's reliance on the collective bargaining agreements and the seniority provisions therein lead to the conclusion that the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 655 F.2d 155, 158-59 (8th Cir. 1981); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971).

UTU argues that the reference in the mailgram to the exhaustion of UTU's "patience and goodwill in attempting to have [MOPAC] stop the use of MKT employees" on KATY trains running over MOPAC lines, makes this a "major" dispute. *Finding of Fact No. 14.* UTU contends that this refers to efforts to negotiate a new contract or to change the existing collective bargaining agreement. However, the language relied upon is ambiguous at best and does not deviate from the basic

position of UTU expressed in the mailgram—that MOPAC is breaching the collective bargaining agreements *currently in effect* by allowing KATY employees to operate KATY's trackage rights over MOPAC lines. The language relied upon by UTU does not convince this Court that what UTU was actually trying to do was to bargain for a new or altered contract.

UTU next argues that the allegations in its counterclaim make this a "major" dispute. In ¶9 of UTU's counterclaim against MOPAC, UTU alleges that an "actual and objective working condition" of the relationship between MOPAC and UTU was that trains operating over MOPAC tracks or serving customers on those tracks be manned by MOPAC crews. UTU further alleges that MOPAC unilaterally changed that working condition by allowing KATY crews to operate KATY trains on MOPAC lines. *Counterclaim ¶14.* The UTU contends that this creates a "major" dispute because MOPAC violated §152, Seventh[5] and §156[6] of the RLA by making such changes

[5] 45 U.S.C. § 152, Seventh, provides:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

[6] 45 U.S.C. § 156, provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended (change in agreements) affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

without following the procedure in §156. 45 U.S.C. §152, Seventh; §156.

The law is clear that a change in "working conditions" which violates §152, Seventh and §156, is a "major" dispute where the contract involved is not "reasonably susceptible" to an interpretation that the change is justified or permitted by the contract. *Trans World Airlines*, 655 F.2d at 157-59. *See also Burlington Northern*, 458 F.2d at 357; *Braniff International Airways*, 437 F.2d at 1274. However, this rule is not applicable here, where the ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under §152, Seventh and §156, at least with respect to the crewing provisions of the trackage rights agreement.

The ICC's exemption power is found in §11341(a) of the Interstate Commerce Act, which provides, in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. . . . A carrier, corporation, or person participating in [an] approved or exempted transaction *is exempt* from the antitrust law and *from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. §11341(a). The exemption provided by §11341(a) is self-executing, *Chicago and Northwestern Railway Co.*, 314 F.2d at 432, but here the ICC twice made it clear that MOPAC and KATY are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement. *See Findings of Fact Nos. 18, 22, 23. See Chicago & North Western Railway Co.*, 314 F.2d at 431-32 (no express or implied exception of RLA provisions from ICC exemption power).

It is the opinion of this Court that § 11341(a) exempts MOPAC from any duty under RLA § 152, Seventh or § 156 concerning the use of KATY employees on MOPAC lines. *See also* Part 1,2,b, *infra.* UTU argues that this Court must make a *de novo* determination of whether such an exemption is "necessary to let [MOPAC] carry out the transaction. . . ." 49 U.S.C. § 11341(a). Although such a determination may be necessary where the ICC has failed to expressly make any findings concerning exemption, *see Chicago and Northwestern Railway Co.*, 314 F.2d at 432, it is not necessary here where the ICC has expressly relieved MOPAC from the obligations of the RLA. To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC. 28 U.S.C. § 2342. UTU's reliance on *Texas and New Orleans Railroad Company v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963), *reh. denied,* 375 U.S. 871 (1963), is misplaced, because in that case there was no express finding by the ICC that the provisions of the RLA should be exempted. Moreover, to the extent that *Texas and New Orleans Railroad* stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition.

Finally, UTU argues that this dispute cannot be considered a "minor" dispute, because if MOPAC is exempt from the requirements of the RLA, then MOPAC cannot be required to submit this dispute to a final and binding decision by the NRAB. More importantly, UTU argues that because MOPAC need not submit the dispute to the NRAB, the rationale for excepting strikes over "minor" disputes from the prohibitions of the NLGA is absent, and, therefore, the NLGA applies to prohibit an injunction against the threatened strike. This is an interesting argument, but it is the opinion of this Court that, assuming MOPAC is exempt from the RLA requirement that

"minor" disputes be submitted to the NRAB, it does not follow that the rationale for excepting "minor" disputes from the prohibitions of the NLGA is absent.

The rationale is not absent, because the ICA provides "a process for a final decision," *Chicago River,* 353 U.S. at 42n.24, and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In *Chicago and North Western Railway Co.,* the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. 314 F.2d at 431. Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the NRAB is displaced. Just as the NLGA is excepted to enforce the labor jurisdiction of the NRAB, in this case the NLGA is excepted to enforce the labor jurisdiction of the ICC.[7]

In sum, this is a "minor" dispute and § 104 of the NLGA does not deprive this Court of jurisdiction to enjoin defendants' threatened strike.

b. EVEN IF THIS IS A "MAJOR" DISPUTE, THE PROHIBITIONS OF THE NORRIS-LaGUARDIA ACT ARE DISPLACED BY THE POWER AND JURISDICTION OF THE ICC UNDER THE INTERSTATE COMMERCE ACT

This Court finds it necessary to rest this Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an alternative basis: Even if this is a "major" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

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[7] It may be argued that the analogy between the NRAB jurisdiction over "minor" labor disputes and the ICC jurisdiction over labor disputes is not perfect as it relates to the NLGA, because the ICA was not "adopted as a part of a pattern of labor legislation." *Chicago River,* 353 U.S. at 42. This argument is dealt with in section b, *Infra.*

As discussed *supra*, it is the opinion of this Court that MOPAC is exempted under § 11341(a) of the ICA, 49 U.S.C. § 11341(a), from the requirements of the RLA with respect to "major" disputes. RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156 It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve transactions, including trackage rights agreements, between carriers, 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.[8] *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971). Nevertheless, UTU argues that it is still free to strike MOPAC over its refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines.

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[8] UTU argues that § 11347, 49 U.S.C. § 11347, which provides that "[n]otwithstanding this subtitle, the arrangements [to impose employee protective conditions] may be made by the rail carrier and the authorized representative of its employees," authorizes MOPAC and UTU to negotiate over the crew selection issue. However, the crew selection clause in the trackage rights agreement is a material term of the agreement which the ICC approved and is not one of the employees protective conditions that may be altered by the carrier and the employee representative. Moreover, the use of the term "may" in the provision relied upon by UTU suggests that it is permissive rather than mandatory. Therefore, MOPAC does not have any *duty* to negotiate with UTU under that provision.

The authority of the ICC in consolidation and trackage rights proceedings is plenary and exclusive. 49 U.S.C. § 11341(a); *Chicago & North Western Railway Co.*, 314 F.2d at 431. In *Chicago & North Western Railway Co.*, the Eighth Circuit held that this power includes jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. *Id.* There the union argued that it had a right to strike over five jobs which were being eliminated, and other seniority problems, pursuant to an ICC-approved merger. The issue in that case was whether disputes arising from the merger must be resolved according to the procedures of the RLA or the arbitration provisions of the ICC order approving the consolidation in question. In affirming the district court's ruling that the ICC order controlled and that the RLA procedures were inapplicable, the Court of Appeals extensively discussed the relationship between the jurisdiction of the ICC over consolidations and the rights of employees affected thereby. *Id.* at 427-33.

The *Chicago & North Western Railway Co.* Court held that the ICC has the right to make provisions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures. *Id.* at 427. The Court found the "major"/"minor" analysis inapplicable because the RLA had been exempted by the ICC. *Id.* at 429. Accordingly, the ICC had the power to authorize changes in working conditions and to resolve conflicting seniority rights free from the constraints of the RLA. *Id.*

Moreover, the Court found support for its conclusion in the legislative history of the ICA. The Court pointed out that the Harrington amendment to the ICA, which would have brought about a freeze of existing employees in their job rights and thereby would have threatened to prevent all consolidations, *id.* at 430, was defeated. The Court concluded that Congress intended the jurisdiction of the ICC to displace RLA procedures in merger-related disputes:

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

Id. at 431. Several years later the Eighth Circuit read *Chicago & North Western Railway Co.* as holding that "the employees did not have a right to strike over merger-related disputes." *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279, 1285 (8th Cir. 1977).

UTU relies heavily[9] upon *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). In that case the carrier had given the union notice, under RLA § 156, of an intended change in operation. The carrier had also applied for and received approval from the ICC to carry out the change, which approval imposed certain employee protective conditions. However, the union threatened to strike after the carrier put the approved changes into effect and the carrier then brought suit to enjoin the strike. The Court affirmed the district court's denial of an injunction and rejected all arguments that the NLGA was displaced by the provisions of the ICA.

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[9] UTU also relies upon *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960). However, this Court finds *Order of Railroad Telegraphers* to be inapposite. There, the Court held that the NLGA prevented the district court from enjoining a strike by the Order of Railroad Telegraphers. The Order of Railroad Telegraphers sought to force the carrier to negotiate an amendment to the contract to prevent the dismissal of any employees as a result of the carrier's consolidation of several stations. The case is not apposite, however, because the ICC was not involved and had not issued any final orders governing the consolidation. Indeed, the carrier was seeking approval from several state agencies. The Court stated: "Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency." *Id.* at 340. Here, on the other hand, MOPAC would be violating a material term of the ICC's approval of the trackage rights agreement if it took any action to require the use of MOPAC employees on KATY trains operating its trackage rights.

First, the *Texas & New Orleans Railway Co.* Court rejected the argument that the exemption power of the ICC exempted the NLGA. The Court held:

> This section [11341(a)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief.

307 F.2d at 156. Second, the Court rejected the argument that the ICC's power to impose employee protective conditions under § 11347 of the ICA should be treated as an exception to the NLGA. The Court viewed such conditions as an imposition of duties on the carrier only and not as a prohibition against the union "from gaining further rights in the transaction through the use of its own economic power—the strike." 307 F.2d at 157. Finally, the Court rejected the argument that the NLGA must give way to the authority of the ICC to approve transactions, *Id.* at 159.

This Court disagrees with the result reached in *Texas & New Orleans Railway Co.* Although *Chicago & North Western Railway Co.* is not on point[10], it is the opinion of this Court that the underlying concern in *Chicago & North Western Railway Co.* warrants rejection of *Texas & New Orleans Railway Co.* In the *Chicago & North Western Railway Co.* case, the Court was concerned with the consequence of narrowly restricting the

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[10] There are two (2) problems with applying *Chicago & North Western Railway Co.* to this case. First, UTU's dispute is not covered by any of the arbitration provisions imposed by the ICC. *See N&W Conditions* Article 1, §§ 4, 11. *See also Finding of Fact No. 8.* Second, that case did not deal with the NLGA question. *Chicago & North Western Railway Co.* was a declaratory judgment action, rather than an action to obtain injunctive relief from a threatened strike. *See also Chicago & North Western Railway Co.*, 314 F.2d at 433.

scope of the ICC's power—labor unions could effectively block many or all consolidations which are approved by the ICC. The Harrington amendment was rejected to avoid such a consequence and, therefore, the Court interpreted the ICC's jurisdiction broadly to displace the applicability of the RLA. Similarly, it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent.

The Supreme Court has stated that it will constrict the NLGA's broad prohibitions "in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary." *Jacksonville Bulk Terminals v. Longshoremen,* ____U.S.____, Slip Op. at 17 (June 24, 1982). Congress gave the ICC exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed." *International Assn. of Machinists and Aerospace Workers v. Northeast Airlines, Inc.,* 473 F.2d 549, 559n.15 (1st Cir. 1972). The legislative history of the ICA evidences this intent. *Id.* Moreover, as the ICC stated in its October 19, 1983, decision:

> If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, *our jurisdiction to approve transactions requiring changes of the working conditions of any employee would be substantially nullified.* Such a result would be clearly contrary to congressional intent.

F.D. No. 30,000 (Sub-No. 18) *et al.,* (October 19, 1983) (emphasis added). *See Finding of Fact No. 23.*

In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection.[11] In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give — the right to operate KATY trains that run over MOPAC lines. If MOPAC

[11] Here, according to the ICC, UTU did not specifically object to the crewing provisions of the trackage rights agreement at any time during the approval proceedings. F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 8-12. *See Finding of Fact No. 23. See also supra*, note 4. UTU disputes this finding, but it matters not because the question of whether UTU objected to the crewing provisions of the trackage rights agreement is not material to this Court's resolution of the NLGA problem.

gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

This Court is aware that *dicta* in various Supreme Court decisions indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called "labor legislation". *Chicago River,* 353 U.S. at 42. The ICA was not enacted "as a part of a pattern of labor legislation," *id.,* but because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine. Indeed, the following passage from *Chicago River* can be read as supporting the result reached by this Court:

> We hold that *the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes.* There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40 (emphasis added). Here, the NLGA must be accommodated to the ICA in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings.

c. MOPAC HAS NOT VIOLATED SECTION 108 OF THE NORRIS-LaGUARDIA ACT

One final argument of UTU is that even if § 104 of the NLGA is inapplicable here, injunctive relief is still not appropriate because MOPAC violated § 108 of the NLGA. UTU contends that MOPAC violated § 108 by failing to negotiate with UTU or submitting this dispute to the National Mediation Board or to voluntary arbitration. *See generally, Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, Peoria & Western Railroad,* 321 U.S. 50 (1944).

UTU's argument must be rejected, however, because § 108 requires a complainant to "make every *reasonable* effort to settle" the dispute. 29 U.S.C. § 108 (emphasis added). In the case at bar the ICC conclusively determined that KATY may use its own employees on its own trains over MOPAC lines. Because the ICC conclusively determined the dispute in the case at bar, it would not be reasonable for MOPAC to negotiate, mediate or arbitrate with the UTU concerning the selection of forces to operate the trackage rights.

d. SUMMARY

In sum, this Court holds that the anti-injunction provisions of the NLGA do not deprive this Court of jurisdiction to enjoin UTU's threatened strike. Two (2) alternative rationales support this holding: first, this is a "minor" dispute within the meaning of the RLA; and second, even if this is "major" dispute within the meaning of the RLA, § 104 of the NLGA is displaced to preserve the purposes and objectives of the ICC's jurisdiction over labor disputes in consolidation proceedings. In addition, this Court holds that MOPAC did not violate § 108 of the NLGA.

3. PRELIMINARY INJUNCTION CRITERIA

In *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the Court identified the following four (4) factors which must be considered by a district court in passing on a motion for a preliminary injunction:

> (1) The threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114. These four (4) criteria weigh in favor of granting preliminary injunctive relief against defendants' threatened strike.

First, it is clear that a strike by UTU against MOPAC is very likely to result in irreparable harm to MOPAC. *Finding of Fact No. 24.* UTU does not even attempt to contest this factor in its opposition to the motion.

On the second element, the balance between the threat of irreparable harm and the harm that will be inflicted on defendants if a preliminary injunction is granted, MOPAC suggests that the harm to UTU will be modest in view of two facts: 1) UTU has consented to a continuance of the temporary restraining order several times; and 2) the N&W Conditions provide UTU employees with adequate protection from the adverse effects of KATY employees operating the trackage rights. *See Findings of Fact Nos. 15, 8.* This Court agrees. The protective conditions provide adversely affected employees with displacement allowances, dismissal allowances and fringe benefits. Moreover, the trackage rights have been operated by KATY with KATY employees for over a year now. Any harm to UTU members has most likely already occurred. Any additional harm that might be caused by enjoining the threatened strike will not be irreparable.

The third factor, probability of success on the merits, is not a problem here. This Memorandum resolves UTU's primary defense, that this Court lacks jurisdiction to enjoin UTU's threatened strike, in favor of the carriers. *See supra.* Moreover, this Memorandum grants plaintiffs' motion for summary judgment on defendants' counterclaim, *see infra.* Therefore, success on the merits is likely.

Finally, the public interest in uninterrupted freight shipment weighs in favor of granting the motion. *See Finding of Fact No. 24.*

Accordingly, plaintiffs' motion for a preliminary injunction is granted.

II MOTION TO REFER ISSUES TO INTERSTATE COMMERCE COMMISSION

Prior to the October 19, 1983, decision of the ICC, *see Finding of Fact No. 23,* UTU moved to refer two (2) issues to the ICC pursuant to 28 U.S.C § 1336(b) and the doctrine of primary jurisdiction. *See United States v. Western Pacific Railroad Co.,* 353 U.S. 69, 63-65 (1956); *Iowa Beef Processors, Inc. v. Illinois Central Gulf Railroad Co.,* 685 F.2d 255 (8th Cir. 1982). UTU phrased these two (2) issues, as follows:

> 1. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific; Western Pacific,* 366 I.C.C. 462 (1982), intend to exempt under 49 U.S.C. § 11341(a) the carriers involved in that transaction from the requirements of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, that they negotiate with rail labor those changes in rules and working conditions which may be required to implement the ICC's permissive authority?
>
> 2. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific; Western Pacific,* 366 I.C.C. 462 (1982), require the Missouri Pacific Rail-

> road (MoPac) and the Missouri-Kansas-Texas Railroad (MKT) both to give advance notice to all MoPac and MKT employees who might be affected by the implementation of the Trackage Rights granted in Finance Docket No. 30,000 (Sub-No. 25) and, if requested, to negotiate an implementing agreement with those employees?

Motion of Defendants To Refer Issue To The Interstate Commerce Commission at 1-2. Following the ICC's October 19, 1983, decision UTU admits that its motion to refer is moot as to issue #1. However, it contends that its motion is not moot as to issue #2. Plaintiffs argue that the ICC's recent decisions also mooted the motion as to issue #2.

Essentially, this Court must decide whether the ICC's orders determined issue #2. UTU contends that the ICC's most recent order did not address the impact of Article 1, § 4 of the N&W Conditions, *see Finding of Fact No. 8,* and the right of UTU to require MOPAC to negotiate an implementing agreement with respect to the selection of forces problem. However, it is the opinion of this Court that the ICC's most recent decision makes it clear that the Article 1, § 4 requirement of notice and negotiation is inapplicable with respect to the selection of forces issue.

In its October 19, 1983, decision the ICC noted defendants' "notice and negotiation" argument, but rejected it. *See Findings of Fact Nos. 22, 23.* Moreover, the ICC held that UTU has *no* right to participate in the crew selection process and that MOPAC/KATY could implement their trackage rights agreement without *any* other approval. *Finding of Fact No. 23.* Finally, the ICC's discussion concerning the interpretation of labor conditions imposed in connection with an approved transaction, further suggests that Article 1, § 4 is not applicable to the crew selection issue:

> [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 6. Read in the context of the ICC's approval of the crew selection provisions of the trackage rights agreements, Article 1, § 4 is not applicable to that issue.[12] *See also Brotherhood of Maintenance of Way Employees v. Interstate Commerce Commission,* 698 F.2d 315, 317n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.")

Arguably, a portion of issue #2 was not decided by the ICC. The issue phrased by UTU is broad enough to cover the

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[12] Thus, as to plaintiffs' trackage rights agreement, the effect of the ICC's orders is that the following sentence is inapplicable:

> Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for *the selection of forces* from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

N&W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

question of whether plaintiffs have any duty under Article I, § 4 to give notice and negotiate an implementing agreement with respect to *issues other than the selection of forces. See Finding of Fact No. 17.* There is no need to refer this question to the ICC, however, because there does not seem to be any ambiguity about this question in the ICC's orders and because the central dispute between the parties, as evidenced by the positions of the parties taken in their memoranda, concerns the narrower question of plaintiffs' duty to negotiate about selection of forces.

Accordingly, UTU's motion is denied.

III CROSS-MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed.R.Civ.P.* 56(c). *See also Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to the non-moving party. *Buller v. Buechler,* 706 F.2d 844, 846 (8th Cir. 1983); *Vette Co. v. Aetna Casualty and Surety Co.,* 612 F.2d 1076, 1077 (8th Cir. 1980). The burden of proof is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller,* 706 F.2d at 846. However, under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P.* 56(e). *See also* 10A Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d,* § 2739 (1983).

Plaintiffs moved for summary judgment on their complaint. Defendants filed a cross-motion for summary judgment. Plaintiffs argue that this is a "minor" dispute, that plaintiffs are exempt from the requirements of the RLA, and that this Court has jurisdiction to enjoin defendants' threatened strike. Defendants argue that this is a "major" dispute, that plaintiffs violated the RLA, and that sections 104 and 108 of the NLGA bar this Court from enjoining the strike.

It is obvious that this Memorandum determines several of the legal issues raised by the cross-motions for summary judgment. Moreover, neither party suggested that there are any genuine issues of material fact with respect to plaintiffs' complaint. Nevertheless, the summary judgment motions relating to plaintiffs' complaint will not be ruled upon at this time for the following reasons.

The parties, in their memoranda, utilize the "shotgun" method of argument. Accordingly, this Court found it difficult to answer each of the parties' contentions in a systematic and orderly fashion. The positions of the parties, especially UTU, seem to change with each response or reply to the prior memorandum. Moreover, the record in this case is remarkably inadequate and incomplete. In several instances the parties rely on documents that are not even in the file! This is not an adequate basis upon which to enter summary judgment on a claim for permanent injunctive relief.

The rulings of this Court on the legal questions related to the NLGA are not subject to further argument. Rather than rule on the parties' cross-motions for summary judgment at this time, however, it is the opinion of this Court that the parties should reevaluate their summary judgment positions in light of this Memorandum. The parties are also ordered to meet and confer for the purpose of: 1) attempting to settle this dispute or come to an understanding as to what, if any, legal or factual

issues remain undetermined; 2) stipulating to as many undisputed and necessary facts as possible; 3) organizing the complete documentary record in this case into a presentable form; and 4) determining whether any oral testimony will be necessary on any remaining issue, including the question of whether the preliminary injunction issued herein should be made permanent. The parties shall meet and accomplish these purposes within ten (10) days of the date of this Memorandum. The parties shall appear before this Court on Friday, March 16, 1984, at 10:00 a.m., to report on the results of their efforts. The trial of this case is reset for March 26, 1984.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiffs' motion for summary judgment on defendants' counterclaim presents a different situation. It can be determined solely by reference to the ICC's orders in this case and the arguments of the parties are more clear.

Count I of defendants' counterclaim alleges that MOPAC violated § 156 of the RLA by unilaterally changing the objective working conditions of its employees without following the procedures of § 156. This Court agrees with plaintiff, as discussed *supra*, that the ICC's actions exempt MOPAC from the requirements of the RLA. 49 U.S.C. § 11341(a). Accordingly, plaintiffs' motion is granted as to Count I of defendants' counterclaim and said count is dismissed.

Count II of defendants' counterclaim alleges that both MOPAC and KATY violated the orders of the ICC by failing to comply with the N&W Conditions, specifically Article 1, §§ 3 and 4, in connection with the use of KATY employees to operate the trackage rights. Again, as discussed *supra*, this Court agrees with plaintiffs that the ICC orders in question make it very clear that those sections of the N&W Conditions were not intended to apply to the crew selection provisions of the trackage rights agreements. To the extent UTU takes issue

with the actions of the ICC, this is not the proper forum for resolution of that issue. 28 U.S.C. §§ 2321(a), 2342. Accordingly, plaintiffs' motion is granted as to Count II of defendants' counterclaim to the extent that that count seeks to force plaintiffs to negotiate the selection of forces to perform the trackage rights authorized by the ICC.

However, Count II of defendants' counterclaim can be read as requesting this Court to order plaintiffs to comply with N&W Conditions, Article 1, § 4, with respect to *issues other than crew selection.* For example, there is no indication that the ICC made the first sentence of the second paragraph of Article 1, § 4, inapplicable to this transaction.[13] *Of supra,* note 13. It is clear that plaintiffs did not give the twenty (20) days notice required by Article 1, § 4. *See Finding of Fact No. 17.* It is also clear that KATY complied with Article 1, § 4 with respect to its own employees. *See Finding of Fact No. 21.* But the extent to which MOPAC so complied, with respect to its own employees, is not clear on this record. This may present a question of fact and, therefore, plaintiffs' motion is denied as to this aspect of Count II of defendants' counterclaim. The parties' conferences, pursuant to Part III of this Memorandum, shall address Count II of defendants' counterclaim.

/s/ JOHN F. NANGLE

UNITED STATES DISTRICT JUDGE

Dated: March 1, 1984

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[13] The first sentence of the second paragraph of Article 1, § 4, provides:

> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to *application of the terms of conditions* of [these N&W Conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice.

N&W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

PERMANENT INJUNCTION

IT IS HEREBY ORDERED that defendants and each of them, and all classes of employees represented by defendants, their officers, representatives, agents, members, servants, employees, attorneys, and other persons in active concert or participation with them be and are hereby enjoined and restrained from engaging in the following actions as a result of the operation of Missouri-Kansas-Texas Railroad Company trains over Missouri Pacific Railroad Company tracks pursuant to the authorization of the Interstate Commerce Commission in Finance Docket No. 30,000 (Sub-No. 25):

1. threatening, calling, instigating, authorizing, encouraging, participating in, approving, or continuing any strike and/or concerted work stoppage or work slowdown against Missouri Pacific Railroad Company, and all acts in furtherance or in support thereof;

2. establishing and/or maintaining any picket or picket line on the premises on which the Missouri Pacific Railroad Company conducts its operations, including the entrances and any other places where said premises are situated; from interfering with ingress to or egress from said premises including the delivery, unloading, loading, dispatch and movement of rolling stock and equipment and the contents thereof, or from loitering or congregating at or near any approaches thereto, and upon any public street or highway leading to and from any place which the employees of the Missouri Pacific Railroad Company or those having business with the Missouri Pacific Railroad Company desire to enter or leave en route to or from said premises;

3. slowing down or interfering with the orderly and prompt continuance of work in Missouri Pacific Railroad Company's operations;

4. failing or refusing to report for work in accordance with the agreement between each individual defendant or class member and Missouri Pacific Railroad Company and in accordance with the labor agreement between the Union and the Missouri Pacific Railroad Company; and

5. carrying out or effectuating or conspiring to carry out or effectuate the activities enjoined in paragraphs 1, 2, 3, and 4 above.

IT IS FURTHER ORDERED that the said defendants, and each of them, and all classes of employees represented by defendants, including all agents, members, servants, employees, and attorneys, and other persons in active concert or participation with them take all affirmative steps within their power to prevent any picketing, strike, work slowdown or work stoppage, as fully described in paragraphs 1, 2, 3, and 4 above.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the preliminary injunction entered by this Court on February 7, 1984, as justified by this Court's Memorandum of March 1, 1984, be and is made permanent, as modified, and judgment be and is entered in favor of plaintiff and intervenor-plaintiff on their complaints.

IT IS FURTHER ORDERED that, in accordance with the "Joint Statement" of the parties, those aspects of Count II of defendants' counterclaim which this Court's Memorandum of March 1, 1984, expressly refused to resolve be and are dismissed without prejudice. Plaintiff MOPAC also asks that judgment be entered in its favor on all other aspects of Count II of defendants' counterclaim. However, this is unneccessary in

view of the fact that this Court's Memorandum of March 1, 1984, partially granted plaintiffs' motion for summary judgment on Count II. *Memorandum of March 1, 1984* at 31-32.

IT IS FURTHER ORDERED that defendants' motion to strike certain language from the injunction be and is denied.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984

BEST AVAILABLE COPY

No. 85-1054

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
AND INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM OF RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN RESPONSE TO PETITION

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January 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1054

UNITED TRANSPORTATION UNION, *et al.*,
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MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
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Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM OF RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN RESPONSE TO PETITION

Respondent Missouri Pacific Railroad Company ("MPRR"), plaintiff in the District Court proceeding below, submits this memorandum in response to the petition for certiorari before judgment filed by the United Transportation Union ("UTU") and its various officials.[1]

[1] The listing required for Missouri Pacific Railroad Company by Rule 28.1 appears in Appendix A to this memorandum.

The UTU's extraordinary petition recognizes that the fundamental issue presented by the District Court's decision, involving the relationship between the Railway Labor Act and the Interstate Commerce Act, has been presented directly for this Court's review in several pending petitions. See Nos. 85-792, 85-793, 85-983, 85-997. All of the parties in the proceeding below—the railroads, the union and the ICC—support those petitions to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985) ("*BLE*").

In its current petition, the UTU seeks certiorari to resolve before judgment several issues ancillary to those presented for review in *BLE*. Those issues are raised in a decision of the United States District Court for the Eastern District of Missouri; the UTU's appeal of that decision, argued over one year ago, is awaiting disposition by the United States Court of Appeals for the Eighth Circuit. *Missouri Pacific Railroad Company* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *app. pending*, No. 84-1465 (8th Cir.).

The UTU asks that its current petition be granted only if this Court decides to review the D.C. Circuit decision in *BLE*. See Pet. 3, 24. Therefore, the ancillary questions presented by the UTU's current petition—and an evaluation of whether those questions are "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court" (Rule 18)—are not yet ripe for this Court's consideration.

Accordingly, while MPRR submits that UTU has not established in its petition that the ancillary questions presented satisfy this Court's traditional criteria for review or the much more demanding prerequisites for certiorari before judgment, we respectfully request that this Court defer consideration of the UTU's current petition until it has determined whether to grant the petitions in No. 85-792 and the related dockets. If this Court determines to grant one or more of those petitions, we respectfully request that we be afforded thirty days to submit a full response to the UTU's current petition. If this Court declines to review the D.C. Circuit Court's decision in *BLE,* the UTU's current petition should be dismissed.

Respectfully submitted,

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January 1986

*Counsel of Record

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondent Missouri Pacific Railroad Company:

The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Chicago and Western Indiana Railroad Company
The Denver Union Terminal Railway Company
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Union Pacific Corporation

Supreme Court, U.S.
FILED
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No. 85-1054

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OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITION

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Texas Turnpike Authority Abandonment - St.L. S. W. Ry. Co. of Texas, 328 ICC 42 at 46 (1965) 9

Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company, 366 ICC 462 (1982), *aff'd* in relevant part, Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 1173 (1984) 1

Statutes:

49 U.S.C. §11341 5,7,8,9

PARTIES TO THE PROCEEDINGS

The Petitioners herein, the United Transportation Union and Messrs. I. Newcomb, R. D. Hogan, K. R. Guethle, W. J. Shelton, R. L. Helms, T. K. Arthur, R. W. Bretch, R. P. Shocklee, B. J. Bennett, J. E. Queathem and K. M. Danneman, were all Defendants in the original suit filed by the Missouri Pacific Railroad Company in the District Court below.

Respondent Missouri Pacific Railroad Company was the original Plaintiff in the action filed in the District Court below.

The Missouri-Kansas-Texas Railroad Company intervened as a party Plaintiff in the original action filed in the District Court below.

The Interstate Commerce Commission intervened in the United States Court of Appeals for the Eighth Circuit proceeding.

Rule 28 - Subsidiaries Parents And Affiliates of Respondent

Katy Industries, Inc.

Sterling - Salem Corporation

Diamond Stylus Company, Ltd.

G.E.G.F. (USA), Inc.

Galveston, Houston & Henderson Railroad Company

Terminal Railroad Association of St. Louis

No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

In October, 1982, the Interstate Commerce Commission ("ICC"), approved the consolidation of the Missouri Pacific Railroad ("MoPac"), with the Union Pacific Railroad Company. See *Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company,* 366 ICC 462 (1982), *aff'd* in relevant part, *Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984) *cert. denied,* 105 S.Ct. 1173 (1984). To minimize the impact of said consolidation on com-

petition, Respondent Missouri-Kansas-Texas Railroad Company ("MKT"), in said proceedings before the ICC, sought and obtained the right to operate its trains over MoPac's rail lines between Omaha, Nebraska, and Kansas City, Missouri (the trackage rights). (See 366 ICC at 567, *et seq.*) These trackage rights sought and obtained by MKT would allow MKT to operate its own trains, using its own employees and equipment over MoPac tracks, giving MKT direct access to the grain markets in the Omaha, Nebraska area. (*Id.*) Although Petitioner United Transportation Union ("UTU"), actively participated in the ICC proceedings, never once did the UTU object to MKT's proposed operating plans, including the use of MKT employees to operate MKT equipment pursuant to the trackage rights.

Subsequent to the ICC order approving the consolidation, Petitioner UTU and MKT entered into a collective bargaining agreement which established the terms and conditions of employment pursuant to which MKT employees would operate MKT equipment over such tracks (App. 5c).[1] At no time did the UTU suggest to MKT that MKT did not have the right to use its own employees on such trains. The formal trackage rights agreement between MKT and MoPac recognized that MKT should, with its own employees, at its own cost and expense, operate its own trains and equipment over the tracks in question (App. 6c).

Despite the fact that the UTU had previously entered into an agreement with MKT approving MKT's use of its own employees to operate its own equipment over said tracks, several days before the operations were to begin, UTU demanded of MoPac that MKT use MoPac crews to conduct the trackage rights operations (App. 6c, 7c). MoPac was, in essence, placed in the middle of a controversy between two factions of the UTU—i.e., the local representing MoPac

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[1] All references to the record are made herein by citing the Appendix to Petitioners' Petition herein (App.).

employees and the local representing MKT employees. Nevertheless, MKT began its trackage rights operations and continues the same to date (App. 6c). Shortly thereafter, UTU threatened to strike the MoPac operation if MoPac did not arrange "to halt this trespass on our collectively bargained agreements and our seniority period" (App. 6c, 7c).

On March 30, 1983, MoPac filed its Complaint in the United States District Court for the Eastern District of Missouri seeking declaratory and injunctive relief against the threatened strike (App. 7c). On that date, the District Court entered a temporary restraining order enjoining a UTU strike against MoPac. (*Id.*) Thereafter, MKT intervened in the District Court action as a party Plaintiff (App. 3c). Subsequently, Cross-Motions for Summary Judgment were filed by the parties in the District Court (App. 2c). On February 7, 1984, the District Court entered a preliminary injunction, thereby granting, in part, MKT and MoPac's Motions for Summary Judgment (App. C Fn 1). Thereafter, on March 16, 1984, a trial on the merits was held based on a stipulated record. The Court thereafter entered a permanent injunction (App. C and D). The District Court held that (a) UTU's threatened strike would violate the Railway Labor Act, (b) that neither MoPac nor MKT had violated the Railway Labor Act or the Norris-LaGuardia Act, (c) that the issue involved here was a minor dispute (i.e., a dispute over the meaning of a collective bargaining agreement as to which the Railway Labor Act describes compulsory arbitration as exclusive remedy and, therefore, the Norris-LaGuardia Act did not bar an injunction in the case), and finally, (d) that even if the case involved an issue that was not a minor dispute, 49 U.S.C. §11341(a), affording an exemption from all federal and state laws affecting a merger of railroads, as was involved herein, would override the Norris-LaGuardia Act and allow the Court to enjoin this threatened strike so as to allow the railroads to carry out the ICC-approved consolidation found to be in the public interest. (*Id.*)

The UTU then appealed the Court's permanent injunction order to the United States Court of Appeals for the Eighth Circuit. On January 15, 1986, the Eighth Circuit rendered its *per curiam* decision affirming the District Court's judgment. A copy of the Eighth Circuit's opinion is attached hereto as Appendix A.

SUMMARY OF ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

The Order Of The ICC Granting MKT Trackage Rights Is Plenary And The Norris LaGuardia Act Anti-Injunction Provisions Must Yield For The Reason That 49 U.S.C. §11431(a) Exempts The ICC Merger Plan From The Effect Of All State And Federal Law Which Would Conflict With The Plan.

II

The District Court's Injunction Does Not Violate The Thirteenth Amendment To The Constitution Of The United States; Section 2, Tenth Of The Railway Labor Act, 45 U.S.C. §152, Tenth; Nor 29 U.S.C. §52 For The Reason That Said Injunction Does Not Require Employees To Work, Rather Prohibits Illegal Work Stoppages. The Employee Always Retains The Right To Elect To Terminate His Employment Relationship With MoPac.

ARGUMENT

I

Petitioners argue that the District Court (and now the Eighth Circuit)[2] erred when it held that Petitioner UTU was precluded from striking MoPac to frustrate the implementation by MKT of the trackage rights as granted by the ICC. Petitioners paint for the Court a picture of momentous error on the part of the courts below when it enjoined Petitioners' strike against MoPac. Nothing could be further from the true picture.

Assuming that the controversy did not involve a "minor dispute", the courts below held that MoPac is exempted under 49 U.S.C. §11341(a) from the requirements of the RLA to negotiate with respect to "major disputes" (App. 22c). The courts below held that the ICC authority in merger and trackage rights proceedings is plenary and exclusive (App. 23c). Consequently, the anti-injunction provisions of the Norris-LaGuardia Act must yield so as not to frustrate the public interest findings and orders of the ICC (App. 23c).

Petitioner herein, however, claims that such holding of the courts below conflict with the case law of this Court and of other Circuit Courts. This Court, on the contrary, has been abundantly clear that no labor union nor management activity may frustrate the public interest orders of the ICC. *Norfolk & Western Railway Company v. Richard Nemitz,* 404 U.S. 37 (1971), *reh'g. denied,* 404 U.S. 1026 (1972). See also *BLE v. Chicago & Northwestern Railway Co.,* 314 F.2d at 424 (8th Cir. 1963) *cert. denied,* 375 U.S. 819 (1963).

In *Nemitz,* Norfolk & Western, prior to acquiring other railroad lines *through merger,* had an agreement with several

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[2] Inasmuch as the Eighth Circuit affirmed the District Court the conclusions of the Eighth Circuit and of the District Court's are referred to as "the courts below".

labor unions for the protection of the employees on the railroad lines which were to be acquired. The agreement provided that employees of the acquired lines would not be adversely affected in their employment as a result of the merger. The agreement specifically provided that the post-merger earnings would not be lower than the pre-merger earnings. The Interstate Commerce Commission, in approving the merger, specifically approved the agreement between Norfolk & Western and the labor unions as a condition to the Commission's approval of the merger. After the merger went into effect, certain employees were not paid the compensation promised. At the time when they were about to arbitrate their grievance, the union and Norfolk & Western entered into a new agreement which substantially reduced the compensation payable to such employees. The employees' union then refused to arbitrate their claim, and the employees then sued for damages in the federal courts in that case. The employees argued that their union and Norfolk & Western could not, after the merger, enter into any agreement which would eliminate any of the protections granted to them by the pre-merger agreement, which was a condition of the ICC's approval of the merger.

This Court, in *Nemitz, supra,* at 44, held that the post-merger agreement, which abrogated the pre-merger protective conditions approved by the ICC, must be held to be null and void. In other words, the parties could not negotiate new conditions which were contrary to the express conditions upon which the merger was approved by the ICC.

In the case at bar, the ICC has made it abundantly clear that its grant of trackage rights to MKT, together with the right of MKT to use its own crews to operate such trains, were conditions upon which the ICC approved the Union Pacific-Missouri Pacific merger. The UTU herein, like the Norfolk & Western in the *Nemitz* case, is attempting to change one of the foundation conditions of the ICC approval of the merger. In this case, as in the *Nemitz* case, the ICC conditions must remain intact.

Petitioners claim herein that even if the union's conduct was rendered unlawful by the ICc's order granting trackage rights (which illegality is clear from reading *Nemitz, supra*), the courts below erred in holding that it had jurisdiction to enjoin such unlawful conduct (Petition, p. 20). Petitioners claim that this Court's previous opinions and the opinions of the circuit courts hold that a union may strike with impunity in order to frustrate a merger plan mandated by the ICC (Petition, p. 20). However, no such precedent exists.

The Petition refers to the cases of *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960) as precedents for its proposition that despite the illegality of the union's acts, the Norris-LaGuardia Act withdraws jurisdiction from the Federal Courts to issue injunctive relief.

The *Milk Wagon Drivers* case, *supra,* is very different from the case at bar. In that case, the policies of the Sherman Anti-Trust Act, 15 U.S.C. §1 *et seq.*, conflicted with the labor policies of the Norris-LaGuardia Act. This Court found specifically that the Congress enacted the Norris-LaGuardia Act to prohibit injunctions for violations of anti-trust laws. 311 U.S. at 101. In the case at bar, the opposite is true. The clear Congressional mandate contained in the language of 49 U.S.C. §11341(a) is that — "A carrier, corporation, or person participating in [an] approved or exempted transaction is *exempt* from anti-trust law and *from all other law,* including State and municipal law, *as necessary to let that person carry out the transaction,* hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." (49 U.S.C. §11341(a) (emphasis added). The merger transaction is exempted by virtue of §11341(a) from restraints of the Norris-LaGuardia Act.

Likewise, the *Chicago & North Western R.R.* case is much different from the case at bar. Therein, the Court was faced

with a confrontation between a union which desired to preserve jobs and a railroad that desired to abandon non-essential intrastate stations. The local state public service Commission had approved the railroad proposal to abandon non-essential stations. The local state public service Commission had approved the railroad proposal to abandon non-essential stations. The Court, in holding that the Norris-LaGuardia Act withdrew jurisdiction to issue an injunction in that case, found that there was no specific legal command that the union was violating therein. That case, unlike the case at bar, did not involve an order of the ICC with its plenary power over merger transactions. That case, unlike the case at bar, did not involve §11341(a) which specifically exempts a merger transaction from the restraints of *other* laws.

The Court in *Schwabacher v. United States,* 344 U.S. 182 (1952) addressed the exemption provision of the Interstate Commerce Act and its importance in a railroad merger transaction. The exemption provision was then Section 5(11)—now 49 U.S.C. §11341(a). In that case the Court held:

> Approval of a voluntary railroad merger is dependent upon three, and upon only three, considerations: First, a finding that "it will be consistent with the public interest" (§5(2)(b)). Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable" (§5(2)(b)). Third, assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote" (§5(11)). (Emphasis added.)

(*Id.*at 194).

The Court then stated that,

> When these conditions have been complied with, the Commission-approved transaction goes into effect without

> need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions.

(*Id.*)

The Norris-LaGuardia Act certainly is a "Federal" law. Therefore, it too must yield if it is necessary to enable the merger approved by the ICC to be consummated.

Moreover, Petitioners err when they rely on the Fifth Circuit case of *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1963) in support of their proposition that the Norris-LaGuardia Act must prevail when there is a conflict between that Act and the Interstate Commerce Act, 49 U.S.C. §11341 *et seq.* While the *Texas & New Orleans* case was resolved favorably to the union therein, the case did not involve a conflict between the Norris-LaGuardia Act and the Interstate Commerce Act. The Fifth Circuit emphatically held that *if* there was a clash between the two Acts, the Interstate Commerce Act would prevail.

> If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, *we would have to conclude that Norris-LaGuardia was preempted by section 5(1)),* [the predecessor of §11431(a)], *even though section 5 is not labor legislation.* (Emphasis added.)

307 F.2d at 158.

Not only has the case law held that the ICC power is plenary in merger transactions, the long-held interpretation of the Interstate Commerce Act by the ICC is that the merger orders, such as are involved herein, are self-executing and plenary. (See e.g. *Texas Turnpike Authority Abandonment-St.L. S.W. Ry.*

Co. of Texas, 328 ICC 42 at 46 (1965); *Ex Parte No. 260, Revised Regulations Governing Officers,* 336 ICC 679 at 682 (1970); *Railway Express Agency, Inc.,* 348 ICC 157 at 215 (1975). The Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.,* 104 S.Ct. 2778 (1984) held at 2782 that in construing a statute, considerable weight must be given to the construction of that statute given by the agency charged with the administration thereof.

This Court's opinions, the opinions of the Court of Appeals and the long-held interpretation of the Interstate Commerce Act have all made it clear that the merger transaction ordered by the ICC cannot be frustrated by a conflicting Norris-LaGuardia Act.

II

Finally, the District Court's injunction is not violative of the Thirteenth Amendment to the Constitution of the United States nor any other law.

Petitioners, tongue-in-cheek, present the question of whether the District Court's injunction is an order of involuntary servitude in violation of the Thirteenth Amendment, the Railway Labor Act and 29 U.S.C. §52. Other than to raise the question, the Petition herein does not address the merits of the issue. However, the District Court properly analyzed the issue when raised below.

> Defendant's thirteenth amendment argument must also be rejected. The thirteenth amendment prohibits involuntary servitude. The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez,* 686 F.2d 334, 345-46 (5th Cir. 1982); *New*

Orleans Steamship Assn. v. General Longshore Workers, 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assn.,* ____ U.S. ____, 102 S.Ct. 2673 (1982).

Inasmuch as the employees of MoPac have their choice to be employed by MoPac, there is no involuntary servitude involved. They are only enjoined from striking to frustrate the ICC merger order. Again, strikes by the UTU against MoPac would frustrate the comprehensive merger plan ordered by the ICC.

CONCLUSION

For the reasons set forth above, Respondent Missouri-Kansas-Texas Railroad Company respectfully requests that the herein Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals be denied.

Respectfully submitted,

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Date: January 23, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1465

Missouri Pacific Railroad Company and
Missouri-Kansas-Texas Railroad Co.,
Appellees,

vs.

United Transportation Union; General Committee of Adjustment; I. Newcomb; K.R. Guethle; R.D. Hogan; W.J. Shelton; Richard L. Helms; T.K. Arthur, R.W. Bretch; R.P. Shocklee; B.J. Bennett; K.R. Menges; J.E. Queathem and K.M. Danneman,
Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 14, 1985

Filed: January 15, 1986

Before BRIGHT, Senior Circuit Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

Appellants (United Transportation Union (UTU), its General Committee of Adjustment, and certain of its agents and officers) ask us to vacate the permanent injunction entered by the

District Court[1] barring them and those in active concert or participation with them from striking, picketing, and other specified actions. The injunction is limited to actions against Missouri Pacific Railroad Company (MOPAC) as a result of the operation of Missouri-Kansas-Texas Railroad Company (KATY) trains over MOPAC tracks under trackage rights granted to KATY by the Interstate Commerce Commission (ICC). We affirm.

The ICC granted KATY the trackage rights in question, over MOPAC's opposition, as a condition of the ICC's approval of the consolidation of MOPAC with Union Pacific Railroad Company. *See Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). This consolidation was effected in December 1982. Early in January 1983 KATY, using its own employees, began operations over MOPAC tracks in accordance with the ICC's decision.

UTU sought to have MOPAC require KATY to use MOPAC crews in conducting its trackage rights operations. MOPAC took the position that the ICC had given KATY the right to use its own crews in those operations, and therefore that the matter was out of MOPAC's hands. KATY, for its part, entered into agreements with its own UTU employees to operate its trains in the implementation of its trackage rights over MOPAC tracks as authorized by the ICC. By Mailgram dated March 28, 1983, UTU threatened to strike MOPAC beginning April 4, 1983 if arrangements were not made "to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees. . . ." Stipulations, Appendix I.

---

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

On March 30, 1983, MOPAC initiated the present litigation by filing its complaint under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same date, the District Court entered a temporary restraining order prohibiting implementation of UTU's strike threat.

On May 20, 1983, UTU filed counterclaims against MOPAC and KATY, which had intervened as a plaintiff, challenging KATY's use of KATY crews to operate KATY trains in trackage rights service. UTU alleged that KATY's trackage rights operations violated an "actual and objective rule and working condition" governing MOPAC employees, asserting the existence of a requirement that "trains operating over trackage owned by MoPac . . . be manned by MoPac crews." Designated Record at 33, ¶¶ 8, 9. UTU also contended that MOPAC and KATY had violated certain notice and negotiation conditions of the ICC's approval of KATY's trackage rights. Both of these issues, as well as issues raised by MOPAC's complaint, subsequently were presented by UTU directly to the ICC. On June 29, 1983, UTU filed a petition for clarification in which it asked the ICC to rule

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

Missouri Pacific Railroad Co. v. United Transportation Union, 580 F. Supp. 1490, 1497 (E.D. Mo. 1984).

A few months later the ICC issued a decision rejecting all three of UTU's arguments regarding the selection of crews. *See Denver & Rio Grande Western Railroad Co.,* I.C.C. Finance Docket No. 30,000 (Sub-No. 18 *et al.*) (October 19, 1983) (unpublished), *reprinted in* Brief for Appellants, Appendix I. The ICC held that (a) "trackage rights agreements do not involve a change in UP-MP employees' working conditions," *id.* at 5; (b) MOPAC's employees have "no right to participate in the trackage rights crew selection process," *id.* at 4-5; and (c) pursuant to 49 U.S.C. § 11341, the ICC's approval of KATY's trackage rights applications exempted MOPAC and KATY from any inconsistent requirements of the Railway Labor Act or their collective bargaining agreements, *id.* at 15.

Soon thereafter the parties filed cross-motions for summary judgment. On March 1, 1984, the District Court issued a memorandum opinion, 580 F. Supp. 1490 (E.D. Mo. 1984), explaining in detail the basis for its February 7, 1984 preliminary injunction and granting in part the railroads' motions for summary judgment. The District Court made detailed findings of fact, including a finding that the strike threatened by UTU would cause irreparable injury to MOPAC and to the thousands of shippers it serves. In its conclusions of law, the District Court held that (a) the dispute between MOPAC and UTU is a "minor" dispute within the meaning of the Railway Labor Act, and, therefore, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, does not bar a labor injunction; (b) alternatively, if this is a "major" dispute within the meaning of the Railway Labor Act, the threatened strike would be illegal because the ICC has exempted the railroads from any duty to negotiate with appellants concerning crew selection for KATY's trackage rights, and section 4 of the Norris-LaGuardia Act must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and (c) section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. 580 F. Supp. at 1499-1506.

On March 30, 1984, the District Court entered its permanent injunction against the threatened strike, and issued an accompanying memorandum which, *inter alia,* denied UTU's motion to exclude from the scope of the injunction the individual union members. D.R. at 139-45.

Meanwhile, UTU and another union, the Brotherhood of Locomotive Engineers, petitioned the United States Court of Appeals for the District of Columbia Circuit to vacate the ICC orders granting KATY the right to use its own crews in trackage rights service and exempting under 49 U.S.C. § 11341(a) these crew selection prerogatives from the Railway Labor Act and other laws. On May 3, 1985 (several months after oral argument had been heard on the appeal in the instant case) the District of Columbia Circuit handed down its decision. *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792). In a two-to-one decision, the D. C. Circuit panel held that the ICC had failed to show that the exemption from the Railway Labor Act respecting crew selection was necessary. Accordingly, the court vacated the ICC orders relied upon by the railroads and left the parties to their Railway Labor Act remedies. A petition for rehearing and suggestions for rehearing en banc were filed, and on July 12, 1985, the D. C. Circuit *sua sponte* amended its opinion so that instead of leaving the parties to their Railway Labor Act remedies the court remanded the case to the ICC, giving the ICC the opportunity to exercise its exemption authority by explaining "why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." *Id.* at 725. The opinion thus having been amended, the petition for rehearing and suggestions for rehearing en banc were denied on August 9, 1985.

The ICC then petitioned the Supreme Court for a writ of certiorari; the Court has not yet ruled on the petition, and the D.

C. Circuit, which first stayed its mandate and then eventually issued it on November 12, 1985, recalled its mandate on November 18, 1985 pending the Supreme Court's action. The ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force.

On December 23, 1985, appellants filed a petition for a writ of certiorari requesting the Supreme Court, if it grants review of the D. C. Circuit case, to review the present case before judgment by our Court. The Supreme Court has not yet acted upon this petition. We could hold our decision in abeyance during the pendency of the petition, or proceed to issue it now. For whatever assistance it may be to the parties and to the progress of the litigation, we issue it now.

As the District Court correctly noted, if a dispute is minor and cannot be resolved by the normal grievance procedure, the parties must submit their differences to the National Railroad Adjustment Board, the jurisdiction of which is exclusive. *See Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972). It follows that a strike over minor disputes violates the Railway Labor Act and may be enjoined by a federal district court, notwithstanding the prohibitions of the Norris-LaGuardia Act. *See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,* 373 U.S. 33 (1963); *Chicago and Northwestern Transportation Co. v. United Transportation Union,* 656 F.2d 274, 277 (7th Cir. 1981). On the other hand, the Norris-LaGuardia Act prevents the issuance of an injunction against a railway labor strike over a major dispute, since the Railway Labor Act requires only that the parties negotiate major disputes and "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 42 n.24 (1957). The District Court further noted correctly that the essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract" (major dispute) or

whether the dispute is "over the meaning of an existing collective bargaining agreement" (minor dispute). 580 F. Supp. at 1500 (quoting *Chicago and Northwestern Transportation*, 656 F.2d at 277-78). The District Court then relied upon the strike threat Mailgram from UTU for the conclusion that the instant dispute is a minor rather than a major one. As previously mentioned, UTU's Mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." Based thereon, the District Court concluded that the dispute was "reasonably susceptible to resolution by reference to the contracts between the parties." 580 F. Supp. at 1500.

Appellants contend that the District Court's resolution of the "minor dispute' question on motions for summary judgment was inappropriate because there was a factual dispute as to the underlying reasons for the threatened strike. Appellants submitted an affidavit to show that the dispute involved unsuccessful efforts to negotiate modifications to existing working conditions, and thus that the dispute was a major dispute. We agree with appellants that the affidavit created a factual issue sufficient to preclude summary judgment on the "minor dispute" ground. *See* Fed. R. Civ. P. 56(c).

Our conclusion that the District Court erred in ruling the dispute a minor dispute on motions for summary judgment is not, however, the end of the matter, for the court also held, as an alternative basis for its decision, that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case. In a carefully reasoned opinion the District Court held that MOPAC is exempted under § 11341(a) of the Interstate Commerce Act (ICA), 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act (RLA) with respect to major disputes. We quote from the District Court's opinion:

> RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it related to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

580 F. Supp. at 1502-03 (footnote omitted). In addition, the District Court rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines. To the contrary, the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act (NLGA) are displaced by the jurisdiction of the ICC under the Interstate Commerce Act. The court's essential reasoning is set forth in the following passage from its opinion:

> In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accomodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte

blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Findings of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection. In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because §

> 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

580 F. Supp. at 1505-06 (footnote omitted).

We agree with the reasoning of the District Court on the alternative ground set forth above and believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC. We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, we affirm the judgment of the District Court on the basis of that court's well-reasoned opinion.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

On December 19, 1985, petitioners United Transportation Union [hereinafter, "UTU"], two of its General Committees of Adjustment[1] and officers associated with those Committees filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review a case which was pending before that court on petitioners' appeal from a judgment and permanent injunction which had been issued by the United States District Court for the Eastern District of Missouri enjoining petitioners and employees they represent from striking the Missouri Pacific Railroad. Several weeks after that petition was filed, the Eighth Circuit issued its decision and judgment in that case, affirming the judgment and injunction from which the appeal had been taken. Petitioners

[1] In their petition, petitioners failed to list the General Committees of Adjustment as petitioners.

UTU, *et al.*, pursuant to Rule 22.6 of the Rules of this Court, respectfully submit this Supplemental Brief to bring that decision to this Court's attention and to address its impact on the petition for a writ of certiorari in this case.

OPINIONS BELOW

On January 15, 1986, the Eighth Circuit entered a Per Curiam decision by a three-judge panel of that court affirming the judgment from which petitioners had appealed; that decision is reproduced as Appendix F to this Supplemental Brief. Although that decision has not been officially reported at this time, the court directed that it be published. The Eighth Circuit also issued a separate judgment which is reproduced as Appendix G to this Brief.

JURISDICTION

Petitioners respectfully submit that the fact that the Eighth Circuit has issued its decision on petitioners' appeal to that court does not affect the jurisdiction of this Court to issue a writ of certiorari to review this case, for 28 U.S.C. § 1254(1) provides that this Court may review a case in the court of appeals by such a writ "before or after rendition of judgment or decree . . . ." Petitioners respectfully submit that their original petition should now be construed as one requesting the issuance of a writ to review the decision and judgment which was issued by the Eighth Circuit in this case on Janaury 15, 1986. This petition is clearly timely since it was filed less than ninety days after the judgment of the Eighth Circuit was entered. 28 U.S.C. § 2101(c).

SUPPLEMENTAL STATEMENT

After noting that petitioners had filed this petition for a writ of certiorari and that this Court was also being asked to issue such a writ to the United States Court of Appeals for the District of Columbia Circuit to review the decision by that court

in the related case of *Brotherhood of Locomotive Engineers v. ICC* [hereinafter, *"BLE v. ICC"*] 761 F.2d 714 (D.C.Cir. 1985), *pets. for cert. pending,* Sup. Ct. Nos. 85-792, *et al.,* the Eighth Circuit stated that it "could hold . . . [its] decision in abeyance during the pendency of the petition [in No. 85-1054], or proceed to issue it now." Appendix F at 6f. The court decided to issue its decision at this time "[f]or whatever assistance it may be to the parties and to the progress of the litigation . . . ." *Id.* The decision which the appellate court issued, petitioners respectfully submit, narrowed the issues [2] and clearly shows that there is a conflict between the circuits on questions of law which are crucial to the rail industry today.

When the Eighth Circuit's case was before the district court, respondents Missouri Pacific Railroad [hereinafter, "Missouri Pacific" or "MOPAC"] and the Missouri-Kansas-Texas Railroad [hereinafter, "MKT" or "KATY"] argued that a strike by petitioners was illegal under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* According to respondents, the dispute at bar arose out of the interpretation or application of existing rules and working conditions—*i.e.,* seniority rights—and, thus, was a "minor dispute" over which a union could not lawfully strike under the Railway Labor Act. *See,* Pet. at 9 n.7; 8th Cir.'s Clerk's Record [hereinafter, "C.R."] at 3-4 (Missouri Pacific Complaint at 3-4). Petitioners challenged the validity of that assertion both factually and legally (*see,* C.R. at 85), but the district court resolved the factual question against petitioners on cross motions for summary judgment and concluded that the threatended strike was in fact over a minor dispute. On appeal, petitioners challenged the right of the district court to make that factual finding on a motion for summary judgment; the Eighth Circuit agreed with petitioners stating that the affidavit which petitioners had submitted "created a factual issue sufficient to preclude summary judgment on the 'minor dispute' ground." Appendix F at 7f.

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[2] As explained below, the court's decision eliminated the "minor dispute" issue relied upon by the district court to support its decision.

That conclusion, the Eighth Circuit added, did not end its inquiry, for the district court had based its injunction upon the alternative ground "that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case." Appendix F at 7f. The court then proceeded to summarize the reasoning given by the district court to sustain its alternative conclusion. First, the appellate court observed, the lower court had concluded that, in view of the express statements by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] that the "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval" (ICC Decision of October 19, 1983 at 15, Appendix to ICC Petition in 85-792 at 67a), respondent Missouri Pacific was "exempted under § 11341(a) of the Interstate Commerce Act . . ., 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act . . . with respect to major disputes." Appendix F at 7f. Building upon that conclusion, the district court then "rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines." *Id.* at 8f. According to the appellate court, "the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act . . . are displaced by the jurisdiction of the ICC under the Interstate Commerce Act." *Id.* That holding, as the Eighth Circuit noted, was premised in part upon the district court's conclusion that: " 'To avoid the stifling effects that such economic power [*i.e.,* a strike to obtain a result which the Missouri Pacific was not free to give] would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings.' " Appendix F at 9f, *quoting* Appendix C at 28c.

After summarizing the district court's two pronged analysis, the appellate court stated (Appendix F at 10f):

> We agree with the reasoning of the District Court on the alternative ground set forth above and

believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC.

IMPACT OF DECISION ON REASONS FOR GRANTING THE WRIT

1. As petitioners explained in their Petition for a writ of certiorari (Pet. at 14-18), this case is inextricably entwined with the District of Columbia Circuit's decision in *BLE v. ICC* which the entire rail industry is asking this Court to review. Indeed, petitioners respectfully submit, the Eighth Circuit's decision highlights this inseparable connection because it shows that the injunction in this case was based upon the ICC's necessity determinations, even though those orders were vacated by the *BLE v. ICC* decision.

In this case, petitioners asserted that the district court had to make a *de novo* determination of necessity under 49 U.S.C. § 11341(a) before it could conclude that the Railway Labor Act must give way to the ICC's orders, but the district court refused to conduct such an inquiry. According to the district court, the ICC had "twice made it clear that MOPAC and KATY are exempt from any requirements of the [Railway Labor Act] . . . concerning the crew selection clause in the approved trackage rights agreement." Appendix C at 19c. Since the Hobbs Administrative Review Act, 28 U.S.C. § 2341, *et seq.*, gave the courts of appeals the exclusive jurisdiction to review those ICC determinations, the court ruled that petitioners could not challenge those determinations in the district court. Appendix C at 20c.

Even though those ICC determinations of necessity were set aside by the District of Columbia Circuit in the *BLE v. ICC* case, and even though the *BLE* court stated that until the ICC had made a valid finding of necessity on remand "the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force" (Appendix to ICC Pet. at 45a), the Eighth Circuit nevertheless upheld the district court's permanent in-

junction in this case. According to the Eighth Circuit, an affirmance of the injunction was appropriate in this case because, due to the recall of its mandate by the District of Columbia Circuit pending action by this Court on the petitions for writs of certiorari to review the *BLE* case, the "ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force." *Id.* at 6f. Surely, this formalistic approach to the underlying basis for the injunction in this case warrants this Court, in the exercise of its supervisory powers over the circuits, to accept jurisdiction in this case to avoid the inconsistent results which have been reached here, even if the petitions in *BLE v. ICC* are denied.

2. Petitioners also submit that their petition should be granted in this case if this Court accepts review of the *BLE v. ICC* case, for this case shows that under the ICC's and MKT's view of the allocation of responsibilities over 49 U.S.C § 11341(a), there is a danger that an ICC order may have the effect of relieving a carrier of its obligations under the Railway Labor Act without a showing of necessity being made in any forum. Respondents MKT and ICC have filed separate petitions with this Court to review the *BLE* case because, in their opinion, the immunity granted by 49 U.S.C. § 11341(a) should be "self-executing"—*i.e.*, the ICC should be required to do no more in its order than identify generally what the parties are authorized to do by that order. ICC Pet. at 11; MKT Petition in No. 85-793 at 13. That approach to Section 11341(a), however, addresses only a part of the problem, because the next question which must be answered is: which tribunal—*i.e.*, the ICC or the federal court called upon to apply that immunity—should determine whether the necessity component of Section 11341(a) has been satisfied in a particular case.

The district court and the Eighth Circuit refused to determine the necessity issue because they concluded that the ICC had already decided that question. Moreover, they implicitly found that the ICC had the jurisdiction to address the necessity issue in this case because they believed that "Congress vested the ICC with the authority to resolve such disputes [*i.e.*, labor disputes] during approval proceedings." Appendix C at 28c;

Appendix F at 9f. This allocation of responsibilities over the necessity determination, according to the district court, was required in this case by the Hobbs Administrative Review Act which gives the courts of appeals the exclusive jurisdiction to review ICC decisions. Appendix C at 20c. However, even though the Eighth Circuit had concluded in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 428 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), that federal courts have the jurisdiction to make the necessity determination where the ICC's order did not address this point, this case shows that any attempt to claim that the ICC's order did not address this issue will be viewed as an impermissible collateral attack on the ICC's order. *See,* Appendix F at 9f.

If the *BLE v. ICC* and Eighth Circuit cases are not reviewed by this Court concurrently, there is a potential danger that the necessity component of 49 U.S.C. § 11341(a) will be eliminated for all practical purposes if the ICC's and MKT's view of the Commission's role under that immunity provision is accepted. According to respondents ICC and MKT, the ICC need not address the question of whether an immunity from the Railway Labor Act is necessary when it approves a transaction such as the trackage rights at bar. But yet, those parties also assert that a district court being called upon to enforce the Railway Labor Act or other employee rights should not make a *de novo* determination of the necessity issue; rather, that court, according to the ICC and MKT, must accept on blind faith the ICC's determination that the crew selection provisions of a trackage rights proposal are "material terms" of the ICC's order which "may be implemented" notwithstanding either the Railway Labor Act or employee contractual rights. ICC Appendix at 67a. Under this view of the separation of functions, no tribunal need ever address the necessity component of Section 11341(a).

3. By concluding that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, has no impact on the jurisdiction of federal courts to enjoin a labor dispute arising from an "ICC-resolved, consolidation-related" labor issue, the Eighth Circuit has reached a conclusion of law that conflicts with decisions by

this Court on the relationship between that anti-injunction statute and non-labor statutes. *E.g., Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960); *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *accord, Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). That conclusion of law, and the conclusion that the ICC's order relieved the Missouri Pacific of its obligations under the Railway Labor Act to bargain with the UTU over the impact of the MKT's trackage rights on Missouri Pacific employees, are also in direct conflict with the decision by the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *see*, Petition at 18-24. These conflicts alone, petitioners respectfully submit, justify granting the petition in this case because, as petitioners explained before (Pet. at 16), a uniform resolution of the issues presented by those conflicts is crucial to the rail industry. Rule 17.1(a) and (c) of the Rules of this Court. Moreover, the manner in which the Eighth Circuit decided this case presents another and equally compelling reason why this petition should be granted.

Petitioners have asserted throughout this case that the right to strike involves several rights—*i.e.*, freedoms of speech and association and the prohibition against involuntary servitude—which are protected by Amendments to the Constitution of the United States. *E.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). Those rights are not created by any provision of the Railway Labor Act (*e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-79 (1969)), but, rather, are merely restrained by that Act in a major dispute case until the parties have exhausted the bargaining processes established by that legislation. Consequently, a finding that the Missouri Pacifc was exempt from the bargaining provisions of the Railway Labor Act does not mean that the strike threat in this case was illegal; it simply means that the restraints which that labor statute placed on the right to strike no longer applied.

Petitioners argued before both the district court and the Eighth Circuit that a finding of unlawfulness had to be made before the strike in this case could be subjected to being enjoined, but both courts disregarded that argument, apparently assuming that the ICC order, having conclusively determined the crew selection issue, made any strike over that dispute illegal. Since the railroads will obviously rely upon the Eighth Circuit's decision in their efforts to use the ICC to change existing working conditions, it is important to rail labor that its right to use its concerted economic power not be foreclosed by a rule of law that improperly restrains employee constitutional rights. Since this case presents this question, petitioners urge this Court to grant their petition if the *BLE v. ICC* case is also to be reviewed.

CONCLUSION

For the reasons set forth herein and in their Petition, petitioners UTU, *et al.*, respectfully request that their Petition be granted if this Court also accepts for review the case in *BLE v. ICC*. Moreover, in light of the fact that the decision by the Eighth Circuit is based upon the ICC orders which were vacated by the District of Columbia Circuit in *BLE v. ICC*, petitioners request that this Court, if it denies the petitions in *BLE v. ICC*, nevertheless grant the Petition in this case and summarily vacate the judgments permanently enjoining petitioners from striking.

Respectfully submitted,

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APPENDIX F

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 84-1465

MISSOURI PACIFIC RAILROAD COMPANY and
MISSOURI-KANSAS-TEXAS RAILROAD CO.,
Appellees,

v.

UNITED TRANSPORTATION UNION; GENERAL COMMITTEE OF ADJUSTMENT; I. NEWCOMB; K. R. GUETHLE; R. D. HOGAN; W. J. SHELTON; RICHARD L. HELMS; T. K. ARTHUR; R. W. BRETCH; R. P. SHOCKLEE; B. J. BENNETT; K. R. MENGES; J. E. QUEATHEM and K. M. DANNEMAN,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: January 14, 1985
Filed: January 15, 1986

Before BRIGHT, Senior Circuit Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

Appellants (United Transportation Union (UTU), its General Committee of Adjustment, and certain of its agents and officers) ask us to vacate the permanent injunction entered

by the District Court [1] barring them and those in active concert or participation with them from striking, picketing, and other specified actions. The injunction is limited to actions against Missouri Pacific Railroad Company (MOPAC) as a result of the operation of Missouri-Kansas-Texas Railroad Company (KATY) trains over MOPAC tracks under trackage rights granted to KATY by the Interstate Commerce Commission (ICC). We affirm.

The ICC granted KATY the trackage rights in question, over MOPAC's opposition, as a condition of the ICC's approval of the consolidation of MOPAC with Union Pacific Railroad Company. *See Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). This consolidation was effected in December 1982. Early in January 1983 KATY, using its own employees, began operations over MOPAC tracks in accordance with the ICC's decision.

UTU sought to have MOPAC require KATY to use MOPAC crews in conducting its trackage rights operations. MOPAC took the position that the ICC had given KATY the right to use its own crews in those operations, and therefore that the matter was out of MOPAC's hands. KATY, for its part, entered into agreements with its own UTU employees to operate its trains in the implementation of its trackage rights over MOPAC tracks as authorized by the ICC. By Mailgram dated March 28, 1983, UTU threatened to strike MOPAC beginning April 4, 1983 if arrangements were not made "to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees . . . ." Stipulations, Appendix I.

On March 30, 1983, MOPAC initiated the present litigation by filing its complaint under the Railway Labor Act, 45

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same date, the District Court entered a temporary restraining order prohibiting implementation of UTU's strike threat.

On May 20, 1983, UTU filed counterclaims against MOPAC and KATY, which had intervened as a plaintiff, challenging KATY's use of KATY crews to operate KATY trains in trackage rights service. UTU alleged that KATY's trackage rights operations violated an "actual and objective rule and working condition" governing MOPAC employees, asserting the existence of a requirement that "trains operating over trackage owned by MoPac . . . be manned by MoPac crews." Designated Record at 33, ¶¶ 8, 9. UTU also contended that MOPAC and KATY had violated certain notice and negotiation conditions of the ICC's approval of KATY's trackage rights. Both of these issues, as well as issues raised by MOPAC's complaint, subsequently were presented by UTU directly to the ICC. On June 29, 1983, UTU filed a petition for clarification in which it asked the ICC to rule

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

Missouri Pacific Railroad Co. v. United Transportation Union, 580 F. Supp. 1490, 1497 (E.D. Mo. 1984).

A few months later the ICC issued a decision rejecting all three of UTU's arguments regarding the selection of crews. *See Denver & Rio Grande Western Railroad Co.*, I.C.C. Finance

Docket No. 30,000 (Sub-No. 18 *et al.)* (October 19, 1983) (unpublished), *reprinted in* Brief for Appellants, Appendix I. The ICC held that (a) "trackage rights agreements do not involve a change in UP-MP employees' working conditions," *id.* at 5; (b) MOPAC's employees have "no right to participate in the trackage rights crew selection process," *id.* at 4-5; and (c) pursuant to 49 U.S.C. § 11341, the ICC's approval of KATY's trackage rights applications exempted MOPAC and KATY from any inconsistent requirements of the Railway Labor Act or their collective bargaining agreements, *id.* at 15.

Soon thereafter the parties filed cross-motions for summary judgment. On March 1, 1984, the District Court issued a memorandum opinion, 580 F. Supp. 1490 (E.D. Mo. 1984), explaining in detail the basis for its February 7, 1984 preliminary injunction and granting in part the railroads' motions for summary judgment. The District Court made detailed findings of fact, including a finding that the strike threatened by UTU would cause irreparable injury to MOPAC and to the thousands of shippers it serves. In its conclusions of law, the District Court held that (a) the dispute between MOPAC and UTU is a "minor" dispute within the meaning of the Railway Labor Act, and, therefore, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, does not bar a labor injunction; (b) alternatively, if this is a "major" dispute within the meaning of the Railway Labor Act, the threatened strike would be illegal because the ICC has exempted the railroads from any duty to negotiate with appellants concerning crew selection for KATY's trackage rights, and section 4 of the Norris-LaGuardia Act must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and (c) section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. 580 F. Supp. at 1499-1506.

On March 30, 1984, the District Court entered its permanent injunction against the threatened strike, and issued an

accompanying memorandum which, *inter alia*, denied UTU's motion to exclude from the scope of the injunction the individual union members. D.R. at 139-45.

Meanwhile, UTU and another union, the Brotherhood of Locomotive Engineers, petitioned the United States Court of Appeals for the District of Columbia Circuit to vacate the ICC orders granting KATY the right to use its own crews in trackage rights service and exempting under 49 U.S.C. § 11341(a) these crew selection prerogatives from the Railway Labor Act and other laws. On May 3, 1985 (several months after oral argument had been heard on the appeal in the instant case) the District of Columbia Circuit handed down its decision. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792). In a two-to-one decision, the D.C. Circuit panel held that the ICC had failed to show that the exemption from the Railway Labor Act respecting crew selection was necessary. Accordingly, the court vacated the ICC orders relied upon by the railroads and left the parties to their Railway Labor Act remedies. A petition for rehearing and suggestions for rehearing en banc were filed, and on July 12, 1985, the D.C. Circuit *sua sponte* amended its opinion so that instead of leaving the parties to their Railway Labor Act remedies the court remanded the case to the ICC, giving the ICC the opportunity to exercise its exemption authority by explaining "why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." *Id.* at 725. The opinion thus having been amended, the petition for rehearing and suggestions for rehearing en banc were denied on August 9, 1985.

The ICC then petitioned the Supreme Court for a writ of certiorari; the Court has not yet ruled on the petition, and the D.C. Circuit, which first stayed its mandate and then eventually issued it on November 12, 1985, recalled its mandate on November 18, 1985 pending the Supreme Court's action. The

ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force.

On December 23, 1985, appellants filed a petition for a writ of certiorari requesting the Supreme Court, if it grants review of the D. C. Circuit case, to review the present case before judgment by our Court. The Supreme Court has not yet acted upon this petition. We could hold our decision in abeyance during the pendency of the petition, or proceed to issue it now. For whatever assistance it may be to the parties and to the progress of the litigation, we issue it now.

As the District Court correctly noted, if a dispute is minor and cannot be resolved by the normal grievance procedure, the parties must submit their differences to the National Railroad Adjustment Board, the jurisdiction of which is exclusive. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). It follows that a strike over minor disputes violates the Railway Labor Act and may be enjoined by a federal district court, notwithstanding the prohibitions of the Norris-LaGuardia Act. *See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981). On the other hand, the Norris-LaGuardia Act prevents the issuance of an injunction against a railway labor strike over a major dispute, since the Railway Labor Act requires only that the parties negotiate major disputes and "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42 n.24 (1957). The District Court further noted correctly that the essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract" (major dispute) or whether the dispute is "over the meaning of an existing collective bargaining agreement" (minor dispute). 580 F. Supp. at 1500 (quoting *Chicago and Northwestern Transporation*, 656 F.2d at 277-78). The District Court then relied

upon the strike threat Mailgram from UTU for the conclusion that the instant dispute is a minor rather than a major one. As previously mentioned, UTU's Mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." Based thereon, the District Court concluded that the dispute was "reasonably susceptible to resolution by reference to the contracts between the parties." 580 F. Supp. at 1500.

Appellants contend that the District Court's resolution of the "minor dispute" question on motions for summary judgment was inappropriate because there was a factual dispute as to the underlying reasons for the threatened strike. Appellants submitted an affidavit to show that the dispute involved unsuccessful efforts to negotiate modifications to existing working conditions, and thus that the dispute was a major dispute. We agree with appellants that the affidavit created a factual issue sufficient to preclude summary judgment on the "minor dispute" ground. *See* Fed. R. Civ. P. 56(c).

Our conclusion that the District Court erred in ruling the dispute a minor dispute on motions for summary judgment is not, however, the end of the matter, for the court also held, as an alternative basis for its decision, that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case. In a carefully reasoned opinion the District Court held that MOPAC is exempted under § 11341(a) of the Interstate Commerce Act (ICA), 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act (RLA) with respect to major disputes. We quote from the District Court's opinion:

> RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC

> negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

580 F. Supp. at 1502-03 (footnote omitted). In addition, the District Court rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines. To the contrary, the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act (NLGA) are displaced by the jurisdiction of the ICC under the Interstate Commerce Act. The court's essential reasoning is set forth in the following passage from its opinion:

> In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection. In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires

> the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

580 F. Supp. at 1505-06 (footnote omitted).

We agree with the reasoning of the District Court on the alternative ground set forth above and believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC. We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, we affirm the judgment of the District Court on the basis of that court's well-reasoned opinion.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED.]

APPENDIX G

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

[FILED January 15, 1986]

JUDGMENT

No. 84-1465EM

MISSOURI PACIFIC RAILROAD CO., *et al*,
Appellees,

v.

UNITED TRANSPORTATION UNION, *et al*,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

---

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 15, 1986

A true copy.

ATTEST:

ROBERT D. ST. VRAIN, JR.
Clerk, U.S. Court of Appeals,
Eighth Circuit

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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PARTIES TO THE PROCEEDINGS

Respondent restates its statement of the Parties To The Proceedings and Rule 28 statement of parent and affiliates contained in its original Brief in Opposition to the Petition herein.

No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

This Supplemental Brief of Respondent Missouri-Kansas-Texas Railroad Company ("MKT") is in response to the Supplemental Brief of Petitioners previously filed herein.

Respondent MKT adopts the Statement of the Case as set forth in its previous Brief in Opposition to the Petition.

SUMMARY OF ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent MKT adopts its Summary of Arguments and the arguments related thereto set forth in its original Brief in Opposition to the Petition herein. In addition, the following is a summary of arguments in opposition to points raised by Petitioners in their Supplemental Brief in Support of Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit:

I.

THERE IS NO REQUIREMENT THAT THE ICC OR ANY COURT MAKE A SEPARATE FINDING OF NECESSITY THAT THE 49 U.S.C. § 11341(a) EXEMPTION BE APPLIED. THE EXEMPTION IS AUTOMATIC UPON THE FINDING BY THE ICC THAT A RAILWAY MERGER IS IN THE PUBLIC INTEREST.

II.

THE ATTEMPTED STRIKE BY PETITIONERS IS PROPERLY ENJOINED INASMUCH AS IT ATTEMPTS TO FRUSTRATE THE CONDITIONS ORDERED BY THE ICC TO AMELIORATE THE ANTI-COMPETITIVE EFFECTS OF THE MERGER TRANSACTION HERE INVOLVED. THE DESIRES OF THE UNION MUST, THEREFORE, YIELD TO THE PLENARY ICC-APPROVED MERGER PLAN AND ORDER.

ARGUMENT

Petitioners, in their Supplemental Brief, urge the Court to grant their Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals on four grounds. First, Petitioners now assert, for the first time, that the Eighth Circuit erred in affirming the district court judgment for the reason that the §11341(a) exemption is not applicable herein for lack of a specific finding by the ICC of necessity for said exemption in connection with the merger transaction here involved. Second, Petitioners, for the first time herein, contend that the Eighth Circuit erred because it did not determine which forum — whether the Federal Courts or the ICC — must determine the necessity of the § 11341(a) exemption. Third, Petitioners urge, as they have before, that the decision of the district court (and now the Eighth Circuit) conflicts with previous opinions of this Court and other Circuit Courts of Appeals. Finally, Petitioners claim that before an injunction could be issued herein, there must be an independent finding of an illegal strike.

With respect to the first two issues raised by Petitioners, there is no requirement that any agency or court make a separate finding of necessity before the §11341(a) exemption be applied. This Court has made it crystal clear that the §11341(a) exemption is at once self-executing if the ICC determines that a railway merger transaction is in the public interest. *Schwabacher v. United States,* 344 U.S. 182 (1952).

The court in *Schwabacher v. United States, supra,* addressed the exemption provision of the Interstate Commerce Act and its role in a railroad merger transaction. The exemption provision was then Section 5(11) — now 49 U.S.C. § 11341(a). In that case, the court held:

> "Approval of a voluntary railroad merger is dependent upon three, and upon only three, considerations: First, a finding that 'it will be consistent with the public interest' (§5(2)(b)). Second, a finding that, subject to any modifica-

> tion made by the Commission, it is 'just and reasonable' (§5(2)(b)). Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote' (§5(11)). (emphasis added).

(*Id.* at 194).

The court then stated that:

> "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions."

Likewise, *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) made it abundantly clear that there is no separate requirement of a finding of necessity. The ICC, after determining that the merger is in the public interest, need not make a further finding that the exemption is necessary to carry out the merger. There is no requirement that any court make a determination that the exemption is necessary to carry out the merger. The exemption is automatic when the ICC approves the transaction. The district court and the Eighth Circuit correctly concluded that there was no need to address Petitioners' so-called finding of necessity argument.

Petitioners' third point is that the Eighth Circuit's opinion conflicts with case law concerning the relationship between the Norris-LaGuardia Act and the § 11341(a) exemption. As this Respondent demonstrated at Pages 9 and 10 of its original Brief in Opposition to the Petition for a Writ of Certiorari herein, the case law is absolutely consistent with other cases dealing with a

clash between the Norris-LaGuardia Act and the Interstate Commerce Act. If application of the Norris-LaGuardia Act would frustrate the ICC's conditions for an approved transaction, the §11341(a) exemption must preempt the Norris-LaGuardia provisions. *Schwabacher v. United States, supra; Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151, 158 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1973). (See Respondent's discussion of this point at Pages 9 and 10 of its original Brief.)

Finally, Petitioners seem to claim that the District Court could not issue an injunction herein without independently determining that the threatened strike is improper. Petitioners' reasoning seems to be that under the Railway Labor Act, a "major dispute" is the subject of bargaining until the bargaining process is exhausted, at which time the union is free to exert its economic strength to enforce its demands through a strike unless the strike is otherwise illegal — i.e., involving violence, secondary boycott, etc.

What Petitioners constantly ignore is that the strike here in question attempts to destroy the conditions of an ICC-approved merger. The UTU attempts to destroy the ICC-approved method of ameliorating the anti-competitive effects of the merger between the Missouri Pacific and the Union Pacific Railroads. Conditions of an approved merger transaction may not be changed through economic force nor through agreement. *Norfolk & Western Railway Company v. Nemitz,* 404 U.S. 37 (1971), *reh'g denied,* 404 U.S. 1026 (1972); *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Co., supra.*

The UTU cannot be allowed to unravel the largest ICC-approved merger transaction in the history of this Nation. The strike is illegal. The strike was properly enjoined.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Brief of Respondent MKT in Opposition to the Petition, the Petition for a Writ of Certiorari to the Eighth Circut Court of Appeals should be denied.

Respectfully submitted,

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No. 85-1054

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

STATEMENT

The opinion of the court of appeals (Supp. Pet. App. 1f-10f) is reported at 782 F.2d 107. The district court decision (Pet. App. 1c-37c) is reported at 580 F. Supp. 1490. The judgment of the court of appeals (Supp. Pet. App. 1g) was entered on January 15, 1986. The petition for a writ of certiorari before judgment (Pet.) was filed on December 19, 1986.

Petitioners' supplemental brief (Supp. Pet.) was filed and received by the Commission on January 31, 1986. By order of Chief Deputy Clerk Lorson, respondent Interstate Commerce Commission was given until 30 days from receipt of the supplemental brief

to respond to the petition, as modified by the supplemental brief. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The facts of this case have been repeatedly set forth in the petition and supplemental petition in this proceeding and the petitions, cross-petitions and replies thereto in Nos. 85-792, 85-793, 85-983 and 85-997. There is no real disagreement among the parties concerning the essential facts and hence they will not be reiterated here.

This case involves the effect to be given Interstate Commerce Commission approval of a trackage rights agreement as a condition upon Commission approval of a rail consolidation. The trackage rights in question were imposed to permit the grantee of the trackage rights to compete with the consolidated carriers. In issue are the effects of Commission approval upon the rights of employees of one of the consolidating carriers to resort to a strike in an attempt to obtain alteration of a material term of the imposed trackage rights arrangement.

The courts below held, as principally relevant to this appeal, that (1) the term of the agreement in question was not negotiable and hence resort to self-help to force negotiations was unjustified, and (2) an injunction to prevent resort to self-help under these circumstances was appropriate and not barred by the Norris-LaGuardia Act (29 U.S.C. § 101 *et seq.*).

This case is related to but presents a substantial number of issues beyond those presented by the petitions for writs of certiorari in No. 85-792 and 85-793. It also raises issues beyond those presented by petitioners' cross petition in No. 85-983 and the cross petition of the Brotherhood of Locomotive Engineers in No. 85-997. Respondent Commission has urged

this Court not to grant those cross-petitions because doing so would unnecessarily broaden the issues. That objection is even more valid here. Indeed, as petitioners recognize (Pet. 15-17), they seek to obtain a resolution of issues which need only be reached after the issue presented in the related *BLE* proceedings is resolved.

The Commission agrees with petitioners in this proceeding that a favorable decision by this Court in No. 85-792 will not finally dispose of all issues relating to the effect of Commission approval of the numerous transactions, for which approval is required, upon labor management relations in the rail industry. But, the Commission does not agree that such an all-encompassing resolution should be attempted at this juncture. The desirability of a total resolution, in the view of the Commission, is outweighed by the enormous expansion of issues and increase in complexity of the proceeding that a grant of certiorari in this proceeding and consolidation of this proceeding with *BLE* would engender.

The decisions of the courts below, which petitioners seek to bring before this Court, recognize the interrelationships between the central question presented in No. 85-792 (the effect of Commission approval of a transaction upon any and all impediments to its consummation) and the questions posed by petitioners in their petition for *certiorari* in this proceeding (rail labor's rights to strike and rail management's right to an injunction against such a strike. However, the courts concluded, properly in the Commission's view, that the answer to the principal issue concerning the effect of Commission approval of the transaction was dispositive of the subsequent right to strike issues. Even if a proper resolution of the issue presented in

No. 85-792 is not dispositive of the right to strike issues, it should at least inform their resolution. This Court's decision in the *BLE* proceedings now before it will provide the necessary guidance.

ARGUMENT

The judgments of the courts below are correct and do not conflict with any decisions of this Court. Further review is not warranted.

(1) Petitioners assign (Supp. Pet. 5-6) the inconsistent results in the circuit court below and the circuit court deciding the *BLE* case as a reason for granting certiorari in this case, even if this Court denies certiorari in *BLE*. But the inconsistent results are based on the fact-bound and judgmental issue of what constitutes an adequate finding of necessity to activate the exemption from other laws provided by 49 U.S.C. 11341(a). Such differences do not rise to the level of a split in the circuits requiring intervention by this Court.[1] Moreover, if the Commission's contention in No. 85-792—that the exemption provided by Section 11341(a) is self-executing—is sustained, the finding issue becomes irrelevant.

(2) Similarly, petitioners' other alleged problems (Supp. Pet. 6-7) concerning the appropriate tribunal (district court or Commission) to make the necessity finding and the proper forum to review that finding are irrelevant if no such finding is required. Even if such a finding is required, the problems are no

[1] Petitioners appear to acknowledge (Pet. p. 6) that the right of the competing railroads DRGW and MKT to use their own crews was a material item of the trackage rights conditions; and as far as MKT was concerned that this was evidenced by the fact that MKT's entire case before the Commission was premised upon such crewing.

different than those in any other area involving shared jurisdiction between United States District Courts and the Commission, for example such as in the area of enjoining unlawful abandonments and determining which pre-abandonment cessations of service are justified. See *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 322-23 (1981).

(3) Contrary to Petitioners' claims (Pet. 15-16, 18-23, Supp. Pet. 7-9), the district court's injunction neither violates any Constitutionally protected rights of petitioners nor conflicts with any decisions of this Court.

The First Amendment does not confer an absolute right to strike upon labor unions. This Court has long recognized that the First Amendment's guarantees of free speech and assembly have an important role to play in labor disputes. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *Thomas* v. *Collins*, 323 U.S. 516, 532 (1945). But this freedom of speech and assembly is always subject to the exercise of governmental regulation and control in the interest of the public welfare. Not all speech or assemblage is protected. See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Schneck* v. *United States*, 249 U.S. 47 (1919); *cf. Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Thus, an injunction can issue after the moving party shows that the conduct to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct. *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 584 (1970).

It is well-established that Congress has the power to regulate labor relations in interstate industries and adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N.O.R. Co.* v. *Railway Clerks*,

281 U.S. 548, 570 (1930). "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 233 (1956). Nowhere is this more true than in the railroad industry, as many of petitioners' cited cases recognize. See also *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), relying upon and analyzing decisions of this court in *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. 169 (1961); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); and *United States* v. *Lowden*, 308 U.S. 225 (1939). As relevant to this proceeding, Congress determined that the Interstate Commerce Commission would have exclusive and plenary jurisdiction over rail mergers pursuant to 49 U.S.C. 11343, and would determine the level of protection for employees adversely affected by the approved mergers. *Norfolk & W.R.R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), *reh. den.*, 404 U.S. 1026 (1971).

In this case, MP employees seek the economic self-help of a strike to force MP to negotiate with DRGW and MKT crewing provisions in the trackage rights granted by the Commission, despite the fact that the Commission's order provided that MKT and DRGW could operate such rights utilizing their own crews. Thus, unlike the situation in *Order of Railroad Telegraphers* v. *Chicago & N.W.R.R. Co.*, 362 U.S. 330, 340 (1960), relied on by petitioners throughout their petition and supplemental brief (Pet. 17-23; Supp. Pet. 8), the conduct sought to be compelled by resort to a strike would have required MP to violate the

valid order of the Commission.[2] Under these circumstances, petitioners acknowledge (although they disagree) (Pet. 20) that the court below could validly conclude that the enjoined union conduct would be unlawful.

Petitioners, nonetheless, argue (Pet. 20) that the Norris-LaGuardia Act's ban on injunctions (29 U.S.C. 108) is not lifted because the unions' conduct would violate some other non-labor statute, citing *Railroad Telegraphers, supra.* However, the courts below properly noted that the statement relied upon in *Railroad Telegraphers* is *dicta* and that, while the labor protective provisions of the Interstate Commerce Act were not enacted as part of a piece of labor legislation, those provisions do confer upon the Commission jurisdiction over resolution of labor disputes in connection with rail consolidations (580 F. Supp. at 1506; Pet. App. 28c). None of the cases cited by petitioners addresses this question in the context of violating the labor provisions of the Interstate Commerce Act or a Commission order thereunder; and counsel could find none. The decision of this Court most closely on point, *Nemitz, supra,* supports the reasoning of the courts below.

As to Petitioners' Thirteenth Amendment argument, the district court (Pet. App. 3b) properly found that there is no involuntary servitude:

> Defendant's thirteenth amendment argument must also be rejected. The injunction amendment prohibits involuntary servitude. The in-

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[2] There can be no doubt about the validity of the Commission's order; it was approved in all material respects by the United States Court of Appeals for the District of Columbia Circuit in *Southern Pac. Transp. Co. et al. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1171 (1985).

junction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez*, 686 F.2d 334, 345-46 (5th Cir. 1982); *New Orleans Steamship Ass'n v. General Longshore Workers*, 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, —— U.S. ——, 102 S. Ct. 2673 (1982).

The district court, therefore, properly enjoined the unions from striking against MP and thereby violating a valid Commission order.

CONCLUSION

For the reasons set forth above, further review of the issues sought to be brought before this Court by the petition for certiorari in this proceeding is not warranted. The petition for writ of certiorari should be denied or alternatively held pending resolution of the issues presented in the petitions pending before the Court in Nos. 85-792 and 85-793.

Respectfully submitted,

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and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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On Petition For A Writ Of Certiorari To
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REPLY BRIEF OF PETITIONERS

This reply brief is respectfully submitted by petitioners United Transportation Union, *et al.* [hereinafter, "UTU"], in response to several arguments raised by respondents Missouri-Kansas-Texas Railroad [hereinafter, "MKT"] and Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in their opposition to this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision and judgment of that court in *Missouri Pac. R.R. v. UTU,* 782 F.2d 107 (8th Cir. 1986).

Although respondents MKT and ICC oppose this request for a writ of certiorari, a close examination of their responses shows that there is an urgent need for this Court to grant the writ and either to review or to vacate summarily the Eighth

Circuit's judgment in this case.[1] Both the MKT and the ICC acknowledge the close relationship between the decisions below and the decision by the D.C. Circuit in *Brotherhood of Locomotive Engineers v. ICC* [hereinafter, "*BLE v. ICC*"], 761 F.2d 714 (D.C. Cir. 1985), *pets. for cert. pending*, Sup. Ct. Nos. 85-792, *et al.*, but they nevertheless argue in this case that the writ should not be granted. Petitioners respectfully submit that respondents' arguments are without merit and do not justify a denial of this writ.

I. Respondents' Arguments Show The Need For This Court To Review The Eighth Circuit's Judgment

Respondent MKT opposes this petition because, in its opinion, the lower courts in this case correctly decided the issues presented. However, to support its conclusion, respondent makes an argument based primarily on *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971), which was not accepted or even discussed by the lower courts as a justification for their decisions. Moreover, that argument stretches this Court's decision in the *Nemitz* case well beyond its facts or its relevant holding (*i.e.*, rail labor and management may not abrogate by negotiation employee protective conditions imposed by the ICC) to such a degree that *Nemitz*, in MKT's view, now stands for an entirely different proposition—*i.e.*, rail labor may not require rail carriers, before they accept conditions imposed by a permissive order of the ICC, to negotiate whether they will accept that order or whether the employee protections imposed by that order should be supplemented, not abrogated. If *Nemitz* stands for that proposition, which petitioners submit it does not, the apparent conflict between that view of *Nemitz* and this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960), requires that this petition be granted.

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[1] Initially, petitioners requested that this Court grant the writ in this case only if it also granted the petitions in Nos. 85-792, *et al.* After the Eighth Circuit issued its decision on January 15, 1986, which relied upon the two ICC decisions vacated by the District of Columbia Circuit in *BLE v. ICC, infra*, petitioners modified their petition to request that it be granted even if this Court denied the petitions in Nos. 85-792, *et al.* Petitioners requested in their supplemental pleading that in the event this Court denied the petitions from the D.C. Circuit case, the Eighth Circuit's judgment be vacated summarily.

Respondent ICC's arguments, while less creative, fare no better, for the Commission, in asserting that the merits of this case do not warrant plenary review, totally ignores the clear conflict between the decisions below and the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963). Although the *Texas & New Orleans* court, as respondent MKT emphasized, did add a caveat to its decision that it would have to conclude that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.,* was "preempted" by 49 U.S.C. § 11341(a) if it found that the ICC's authority under Section 11343 was being frustrated by an application of the anti-injunction Act to a particular case (307 F.2d at 158), the court did not find such a conflict in that case even though, as here, rail management relied upon an ICC order as justification for their refusal to bargain.[2] Indeed, that case clearly stands for the proposition that a railroad may not, as occurred in this case, use the ICC's approval processes as a means to modify unilaterally existing employee working conditions. 307 F.2d at 158. Moreover, the *Texas & New Orleans* case also shows that in cases, such as the one at bar, where rail labor has been denied a meaningful opportunity to negotiate work rule changes, Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), does not act to restore to the federal courts the jurisdiction which the Norris-LaGuardia Act withdrew; in other words, the lack of federal court labor-injunctive jurisdic-

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[2] Respondent ICC asserts that petitioners appear to acknowledge that the MKT's crewing proposal was a material term of the trackage rights condition imposed by the ICC's merger order. ICC Memo. at 4 n.1. Petitioners have made no such concession, and indeed, the validity of the concept of "material term" of a proposed financial transaction is an issue in dispute, for petitioner UTU has posed that question as its second issue in its cross-petition in No. 85-983. Moreover, the label of "material term" is the ICC's response to the Fifth Circuit's decision in *City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), and is an effort to avoid the necessity component of § 11341(a). A comparison of the MKT's crewing provision with that of the Rio Grande's shows that labeling a provision as a "material term" under the MKT's and ICC's view of § 11341(a) allows the carrier to establish unilaterally new working conditions. The Fifth Circuit rejected this view of § 11341(a) in the *Texas & New Orleans* case.

tion is not a "restraint" upon a carrier's ability to effectuate an ICC-approved financial transaction. 307 F.2d at 156.

Respondent ICC has not only ignored the *Texas & New Orleans* case, but it has also asserted that no court, to its knowledge, has addressed the interrelationship between the Norris-LaGuardia Act and the ICC's jurisdiction to resolve labor disputes in connection with rail mergers. ICC Memo. at 7. That assertion is incorrect for the *Texas & New Orleans* court has addressed this issue. In that case, the Fifth Circuit concluded that an ICC unification order was not violated when rail labor insisted that the railroads bargain with them over changes in working conditions proposed to the ICC and, according to the railroads, implicitly approved by the ICC when that agency approved the unification proposal. 307 F.2d at 159. Moreover, the Fifth Circuit concluded in the *Texas & New Orleans* case that the Norris-LaGuardia Act was not superseded by the ICC's jurisdiction to impose employee protective conditions.

As petitioners explained before (Pet. at 18-23), the *Texas & New Orleans* case is clearly consistent with prior decisions by this Court emphasizing that the Norris-LaGuardia Act must be broadly construed so as to protect the employee rights which Congress sought to guard in enacting that legislation. *E.g., Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* 362 U.S. at 335-36. Moreover, this Court has never sanctioned the implied repeal of that anti-injunction Act by a non-labor Act of Congress. *Id.* at 339. Nevertheless, the decisions below in this case rejected the *Texas & New Orleans* holdings and "accommodated" the Norris-LaGuardia Act to a non-labor statute—the Interstate Commerce Act. While respondent ICC may argue that such an accommodation is correct, the validity of that accommodation is immaterial at this point, for the relevant question is whether that accommodation is such a marked departure from past precedent that it warrants plenary review by this Court. In view of both the conflict in the circuits over this issue and prior decisions by this Court on the scope of the Norris-LaGuardia Act, petitioners respectfully submit that plenary review of the Eighth Circuit's judgment by this Court is clearly warranted, if this Court grants the petitions in Nos. 85-792, *et al.*

Respondent MKT in its Supplemental Brief and respondent ICC also assert that petitioners' constitutionally protected rights to picket and to withdraw their services from their employer are subordinated to the rights of the public and that such strike activity is illegal in this case because it violates an order of the ICC. MKT Sup. Br. at 5; ICC Memo. at 6-7. That assertion, which was not advanced by the Eighth Circuit as a justification for its decision, is nevertheless consistent with that court's reasoning, and shows the urgent need for this Court to review this case if it also reviews the *BLE v. ICC* decision. Although respondents try, they are unable to refer this Court to any authority which squarely or even inferentially holds that rail labor can be barred from bargaining or from using its constitutionally proteced right to strike in an effort to require a railroad to negotiate changes in working conditions, even if those changes are arguably in response to a permissive order of the ICC. Indeed, the *Texas & New Orleans* case and this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* require a conclusion contrary to that urged by respondents and reached below.

II. Respondent ICC's Belief That A Consolidated Review Of Both the D.C. Circuit's And the Eighth Circuit's Decisions Would Be Too Complex, Is Without Merit

Respondent ICC also asserts that this Court should not accept review of the Eighth Circuit's judgment because a consolidated review of that judgment with the D.C. Circuit's decision would be too complicated. ICC Memo. at 2-3. That argument, petitioners respectfully submit, is nonsense. Everyone involved in these cases recognizes both the importance of the issues presented and the manner in which the two cases are inextricably entwined. Petitioners have asserted, and no one has, or for that matter can, dispute the fact that the "strike" related issues—*i.e.,* those presented by this petition—necessarily flow from an acceptance of the ICC's implicit position in No. 85-792 that its order supersedes the Railway Labor Act, 45 U.S.C. § 151, *et seq.* If the dispute over rail labor's rights in connection with employment changes which are arguably related to an ICC-approved transaction, is to be

settled, it is crucial to rail labor that it be settled fully and finally as soon as possible.[3] That can be accomplished only by a consolidated review of both *BLE v. ICC* and the Eighth Circuit's decision in this case. Such a review will not present too complex of a case because the various issues logically flow from one to the other. Moreover, even if the consolidated case is complex, it is absurd to assert, as respondent ICC implies, that this Court does not have the capacity to handle "complex" cases.

Respondent ICC seeks to support its piecemeal review approach by asserting that a ruling on the issues presented by its petition in No. 85-792, even though not dispositive of the "strike" related issues, "should at least inform" a subsequent resolution of those issues. ICC Memo. at 3-4. That assertion is incorrect, for whether or not the immunity provisions of Section 11341(a) are self-executing does not in any way address the issues of whether such an immunity acts to relieve rail labor of the restraints which the Railway Labor Act places on its right to strike, or whether the Norris-LaGuardia Act's withdrawal of equity jurisdiction from federal courts is a restraint which may be overridden by Section 11341(a). Those are separate issues which must be resolved before this crisis in rail labor relations can be settled. At present, those issues are in doubt because of the conflicts between the circuits and between the Eighth Circuit's judgment and prior decisions by this Court.

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[3] Petitioners have been authorized to state that the Railway Labor Executives' Association [hereinafter, "RLEA"] supports their request for a writ of certiorari in this case. RLEA, as petitioner UTU explained in its cross petition No. 85-983 at 16, is a voluntary association of the chief executive officers of 19 standard labor organizations which collectively represent virtually all organized rail employees today. A list of RLEA's member organizations is attached as Appendix B to the UTU's cross-petition in No. 85-983.

CONCLUSION

Petitioners, fully supported by rail labor, respectfully urge that this Court grant their petition in this case as stated at page 9 of petitioners' Supplemental Brief.

Respectfully submitted,

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Nos. 85-983 and 85-1054

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED TRANSPORTATION UNION,

Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

ON CROSS-PETITION AND PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS

SUPPLEMENTAL BRIEF OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-983 and 85-1054

UNITED TRANSPORTATION UNION,
Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

ON CROSS-PETITION AND PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS

SUPPLEMENTAL BRIEF OF PETITIONERS

This Supplemental Brief is respectfully submitted by petitioner United Transportation Union [hereinafter, "UTU"] pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention a decision which was issued by the United States Court of Appeals for the First Circuit on October 28, 1986 in *BMWE v. Guilford Transportation Industries, Inc.* [hereinafter, "*BMWE* decision"], 1st Cir. No. 86-1366. A copy of that decision is reproduced herein as Appendix A. Petitioner

UTU respectfully submits that part III of the *BMWE* decision (Appendix A at 13a) is relevant to the issues raised by the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in No. 85-1054, and by the cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in No. 85-983.

Petitioner UTU's cross-petition asks this Court to consider whether the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] has the authority under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to relieve a railroad of its Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and contractual obligations to its employees. *See*, Petition in No. 85-983 at i. Petitioner UTU's petition in No. 85-1054 builds upon the issues presented in No. 85-983 by asking this Court to consider issues which arise when rail labor strikes in reaction to a railroad's refusal to bargain over the impact of an ICC approved financial transaction because, in the railroad's opinion, the ICC's order relieved it of any obligation which the Railway Labor Act may have imposed upon it to bargain with rail labor before it unilaterally altered existing working conditions.

Petitioner UTU has noted throughout the course of this controversy that the Railway Labor Act does not create the right to use self-help once the Act's major dispute resolution procedures have been exhausted. *See, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Rather, petitioner has consistently asserted, the Railway Labor Act merely suspends the right to take concerted action in support of bargaining demands [1] until the Act's major dispute resolution procedures have been exhausted. *See*, 29 U.S.C. §§ 52, 102. Thus, petitioner has argued, if an order of the ICC operates to relieve a rail carrier of its obligations under

[1] The Fourth Circuit recently noted that: "Absent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution." *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1163 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-503.

the Railway Labor Act to bargain with rail labor, it must also operate to relieve rail labor of the correlative restraints which that Act places upon its right to use concerted economic self-help in support of bargaining demands over which the railroad no longer has an obligation to negotiate.

In No. 85-1054, the Eighth Circuit rejected petitioner UTU's argument because it concluded that "the anti-injunction provisions of the Norris-LaGuardia Act . . . are displaced by the jurisdiction of the ICC under the Interstate Commerce Act." Supp. Pet. in No. 85-1054 at 8f. Besides being contrary to this Court's statements that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, is not to be accommodated to non-labor statutes such as the Interstate Commerce Act, *e.g., Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 339 n.15 (1960),[2] that conclusion assumed, over petitioner's objections, that the Interstate Commerce Act created a cause of action to prevent a strike by rail labor. That assumption has recently been rejected by the First Circuit in the *BMWE* decision.

In its *BMWE* decision, the First Circuit rejected as being "far-fetched" the railroad's arguments that the "national policy in favor of providing uninterrupted rail transportation . . . permits the issuance of an injunction to prevent secondary picketing." Appendix A at 13a. As the First Circuit explained:

> It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute . . . . It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory rea-

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[2] Recent decisions in several secondary picketing cases have held that the anti-injunction Act is not to be accommodated to the policies of the Interstate Commerce Act. *E.g., Richmond, Fredericksburg & Potomac R.R. v. BMWE*, *supra* note 1; *Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *Burlington Northern R.R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986), *cert. granted*, Sup. Ct. No. 86-39.

> sons, there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure.* If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. ***Obviously, such an argument cannot be seriously made.***

Appendix A at 13a (second emphasis added; footnotes omitted).

This decision shows that the Interstate Commerce Act does not create a cause of action which a railroad may rely upon to prevent rail labor's resort to concerted self-help. That decision, petitioner UTU submits, is entirely consistent with this Court's decision in *Cort v. Ash,* 422 U.S. 66 (1975), and with Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, which provides that peaceful picketing shall not "be considered or held to be violations of any law of the United States."

Petitioner UTU respectfully submits that the *BMWE* decision is relevant to the pending petitions for essentially two reasons. First, the *BMWE* decision conflicts with the underlying rationale of the Eighth Circuit's decision in No. 85-1054. And second, it shows that even if a rail strike conflicts with the policies of the Interstate Commerce Act, that fact does not make it illegal or, more important, enjoinable. Consequently, instead of achieving an expedited implementation of approved financial transactions, the ICC's recent belief that its orders supersede the Railway Labor Act will result only in creating the very tensions and resultant disruptions to rail service that Congress sought to prevent by enacting the major dispute resolution procedures of the Railway Labor Act. *See, Detroit & Toledo Shore Line R.R. v. UTU,* 396 U.S. 142, 150 (1969). Such a result is surely not consistent with Congress' intent in enacting the Interstate Commerce Act.

CONCLUSION

Petitioner UTU submits that its cross-petition and its petition should be granted as requested therein.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 86-1366

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff, Appellee,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,
Defendants, Appellees.

DELAWARE AND HUDSON RAILWAY COMPANY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Bownes and Torruella, *Circuit Judges*.

Richard T. Conway with whom *Shea & Gardner, Ralph J. Moore, Jr., William F. Sheehan, Nancy J. Bregstein, D. Eugenia Langan,* and *Kinga M. LaChapelle* were on brief for appellant.

John O'B. Clarke, Jr. with whom *Highsaw & Mahoney, P.C., Craig J. Rancourt, Law Office of Craig J. Rancourt* and *Louis P. Malone, III,* General Counsel, were on brief for appellee Brotherhood of Maintenance of Way Employees.

October 28, 1986

TORRUELLA, *Circuit Judge.* The principal issue presented by this appeal is whether the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA), overrides the provisions of the Norris-LaGuardia Act, 21 U.S.C. § 101 *et seq.*, to the extent of permitting the enjoining of secondary picketing by a labor organization that has exhausted the procedures established by the RLA for resolution of a "major" dispute[1] with a primary carrier-employer.[2] Although this is a question of first impression in this circuit, we are the fortunate beneficiaries of prior consideration of this query by several of the courts of appeal. *See Burlington Northern R. Co.* v. *B.M.W.E.*, 793 F.2d 795 (7th Cir. 1986) (cannot enjoin secondary boycott); *Central Vermont Ry.* v. *Broth. of Maintenance*, 793 F.2d 1298 (D.C. Cir. 1986) (cannot enjoin secondary picketing); *Richmond, Fredericksburg and Potomac R.R. Co.* v. *B.M.W.E.*, No. 3544 (4th Cir., July 11 1986) (same). *But see, Ashley, Drew and Northern Ry.* v. *UTU, 625 F.2d 1357 (8th Cir. 1980) (secondary picketing may be enjoined when the interests of the party being picketed are not "substantially aligned" with those of the struck employer); Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966) (same). *Cf. Consolidated Rail Corp.* v. *Broth. of Maintenance*, 792 F.2d 303 (2d Cir. 1986) (no need to exhaust RLA remedies before picketing secondary employer).

We affirm, on jurisdictional grounds, the district court's refusal to enjoin such conduct. 29 U.S.C. § 101.

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[1] In RLA parlance a "major" dispute arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *See Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-28 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is concerned with the resolution of grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Inc. R.R.*, 353 U.S. 30 (1957), 45 U.S.C. § 153.

[2] We are not deciding whether secondary activity is enjoinable prior to exhaustion of RLA dispute resolution procedures with the primary carrier employer.

I

The appellee in this case, the Brotherhood of Maintenance of Way Employees (BMWE), is a labor organization representing a bargaining unit of maintenance of way employees of the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (referred collectively hereafter as the Maine Central). Since April, 1984, BMWE and Maine Central have been engaged in the negotiation of changes to their collective bargaining agreement, but have reached no agreement. The parties exhausted the RLA procedures for "major" dispute resolution[3] and thereafter, on March 3, 1986, the BMWE commenced a strike against the primary carrier-employer, Maine Central. Maine Central attempted to continue operating with supervisory personnel and replacements,[4] which in turn led to the escalation of hostilities by the BMWE. The union extended its picketing to other carriers not directly involved in the dispute with Maine Central. The object of this secondary picketing was to indirectly pressure Maine Central to give in to the BMWE's bargaining demands.

The pickets were initially extended to the Boston & Maine Railroad (B & M), which, like the Maine Central, is owned by Guilford Transportation Industries, Inc. (Guilford), a holding company. B & M interconnects with the Maine Central. Thereafter BMWE also picketed Delaware and Hudson Railway Company (D & H), another Guilford subsidiary, which however is non-connecting.[5] Additional non-affiliated and non-connecting railroads were picketed by BMWE, also with the object of exerting pressure on Maine Central.

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[3] 45 U.S. §§ 155-160. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[4] *See Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238 (1966).

[5] Appellee Guilford in its brief raises questions regarding the right to picket these affiliates because of its dispute with Maine Central. We need not enter this quagmire as the district court's decision is not based on the corporate affiliation of appellants to Maine Central, but rather assumes *arguendo* its immateriality. We shall do likewise.

Various suits were commenced throughout the country by the several secondary carriers in an attempt to stop the BMWE's secondary picketing. All of these suits, despite some initial successes in the district courts, were ultimately unsuccessful. The courts of appeal held that the secondary picketing was not prohibited by the RLA and could not be enjoined because of the Norris-LaGuardia Act. *See Burlington Northern R. Co., supra; Central Vermont Ry., supra; Richmond, Fredericksburg and Potomac R.R. Co., supra.*

In the meantime, in an apparent attempt to forestall action by the carriers elsewhere, the BMWE filed a declaratory judgment suit in the U.S. District Court in Maine against Guilford, B & M, and D & H, seeking, among other things, a declaration to the effect that its secondary picketing of B & M and D & H was protected activity under the Constitution and the RLA. The carrier-defendants counter claimed and sought injunctive relief to prohibit the secondary activity.

The district court, after hearing D & H's motion for preliminary injunction, ruled that all that was required for the Norris-LaGuardia Act to apply was that there be a labor dispute and that the union continue to act as a labor organization. Finding that both conditions existed in this case, the court in effect concluded that it was immaterial whether or not the interests of D & H and Maine Central were "substantially aligned." [6] Injunctive relief was denied and this appeal ensued.

II

In 1881 Oliver Wendell Homes, in his now famous essay, stated that "[t]he life of the law has not been logic; it has been experience." [7] The present situation is a case in point, as much of appellant's argument is based on its perception that it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation. What Congress may or may not have

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[6] *See Ashley, Drew and Northern Ry., supra; Brotherhood of Railroad Trainmen, supra.*

[7] Holmes, *The Common Law*, p. 1 (Howe, ed., 1963).

done is explainable less in terms of logic, than by recounting how this legislation developed. Thus, the issue presented by this case cannot be answered, and the answer cannot be properly supported, without consideration of the events leading up to the passage of the RLA, and subsequent legislation.[8]

At common law, all strikes and pickets, whether primary or secondary, were considered illegal combinations or conspiracies. In the early 18th century most of this activity was subjected to criminal sanctions,[9] an attitude that prevailed until *Commonwealth* v. *Hunt* [10] ruled that collective labor activity was not a criminal conspiracy. Thereafter, the civil injunction became the principal weapon by which strikes and picketing were suppressed. In issuing injunctive relief against these concerted activities, courts relied on common law principles of nuisance, trespass and interference with advantageous relationships.[11]

Two views soon emerged, both of which were represented in the leading Massachusetts case of *Vegelahn* v. *Gunter.*[12] In this case the majority held that peaceful picketing to obtain higher wages was an unlawful means of securing a lawful objective. Judge Homes dissented, arguing that if the object of the activity was lawful, any non-violent means was lawful, even against "third persons." In this stage of development of the law of striking and picketing, no distinction appears to have been drawn between primary and secondary activity.[13]

In 1908, the Supreme Court decided the *Danbury Hatters* case,[14] specifically ruling that both primary and secondary

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[8] *See generally* Cox, Bok and Gorman, *Labor Law*, 9th ed. (1981); Note, *Accomodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958); Gregory, *Labor and the Law*, 2d ed. (1958); Frankfurter & Greene, *The Labor Injunction* (1930).

[9] *See, e.g., Commonwealth* v. *Pullis*, Philadelphia Mayor's Ct., 1806.

[10] 45 Mass. (4 Met.) 111 (1842).

[11] *See In re Debs*, 158 U.S. 564 (1895).

[12] 167 Mass. 92 (1896).

[13] *See Plant* v. *Woods*, 176 Mass. 492 (1900), (Holmes, J. dissenting).

[14] *Loewe* v. *Lawlor*, 208 U.S. 274 (1908).

boycotts were actionable in damages pursuant to Section 7 of the Sherman Act.[15] Thereafter the use of the federal courts to enjoin labor disputes became even more prevalent and led to the passage of the Clayton Act in 1914.[16]

In enacting Section 20 of the Clayton Act,[17] Congress attempted to narrow the jurisdiction of the federal courts by prohibiting injunctions in disputes concerning terms and conditions of employment. Purportedly, the only exception was equitable relief necessary to prevent irreparable injury to property or to a property right. The Supreme Court however, in *Duplex Printing Press Co.* v. *Deering*,[18] narrowed Section 20's prohibition on injunctions to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts. Thus secondary activity was held to be enjoinable even after Section 20 was enacted.

Against this background Congress passed the RLA in 1926.[19] Although limited at that time to the railroad industry,[20] the RLA was the first major Congressional recognition of employees' right to organize and to negotiate with employers. The RLA made no mention of secondary boycotts. There are, however, various indications from the text of the statute that the rights and procedures established thereunder were only intended to regulate the relationships between carriers and *their* employees. For example, Section 1, Fifth of the RLA [21] defines the term "employee" as including "every person in the service of a carrier (subject to *its* continuing authority to supervise and direct the manner of rendition of his service)" (emphasis supplied). Several other sections refer to the carrier(s) and "*its* or their employees." [22] The use of the defined term "employee"

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[15] July 2, 1890, c. 647, 26 Stat. 209.

[16] 15 U.S.C. §§ 12 *et seq.*

[17] 29 U.S.C. § 52.

[18] 254 U.S. 443 (1921).

[19] 44 Stat. 577.

[20] It was amended in 1936 to include the airline industry. *See* 45 U.S.C. §§ 181-185.

[21] 45 U.S.C. § 151, Fifth.

[22] Emphasis supplied. *E.g.*, Section 2 (45 U.S.C. § 152) (General duties of carriers and employees to settle disputes), Section 7 (45 U.S.C. § 157) (Arbitration), and Section 10 (45 U.S.C. § 160) (Emergency Board).

throughout the statute strongly suggests that a classical employee-employer relationship was contemplated by Congress.[23]

In our search of the legislative history of the original RLA and its subsequent amendments,[24] we have been unable to find any expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place. In the face of this legislative silence, the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation.

The statements of Congressmen Merritt and Berkeley,[25] relied upon by appellants are at best ambiguous, as is that of D. B. Robertson, President of the Brotherhood of Locomotive Firemen & Enginemen.[26] The language referred to by appellants, presently contained in 45 U.S.C. § 151a(1), to the effect that the RLA prescribes procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules or working conditions," [27] was not in the RLA as enacted in 1926. *See* 44

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[23] *E.g.*, Section 3 (45 U.S.C. § 153) (National Railroad Adjustment Board, referred to in the original act as "Boards of Adjustment"), Section 5 (45 U.S.C. § 155) (Mediation Board, Section 4 of original act), and Section 6 (45 U.S.C. § 156) (procedure in changing rates of pay, rules and working conditions). We note in passing that when the RLA was amended in 1936 to include carriers by air, 49 Stat. 1189, similar language was adopted by Congress, *e.g.*, Section 201 ("air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to *its* or their continuing authority to supervise and direct the manner of rendition of his service."). 45 U.S.C. § 181. Emphasis supplied. *See also* Sections 202 (45 U.S.C. § 182), 203 (45 U.S.C. § 183), 204 (45 U.S.C. § 184) and 205 (45 U.S.C. § 185).

[24] June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, 48 Stat. 1185; June 25, 1936, c. 806, 49 Stat. 1921; Aug. 13, 1940, c. 664, 54 Stat. 785, 786; June 25, 1948, c. 646, 62 Stat. 991; May 24, 1949, c. 139, 63 Stat. 107.

[25] 67 Cong. Rec. 4568; 4519 (1926). "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity [would result]." (Congressman Merritt, 67 Cong. Rec. 4568 (1926).

[26] The RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926).

[27] Emphasis supplied by appellants in their brief.

Stat. 577. In any event, even as it reads today, we must take this language in the light of the definition of the term "employee" previously indicated. That definition establishes that the RLA seeks regulate *only* the relationships and disputes arising between carriers and those persons "subject to the continuing authority [of the carrier] to supervise and direct the manner of rendition of his services," [28] *e.g.*, persons in an employer-employee relationship.

Appellants' best argument would have been that the Supreme Court's decision in *Duplex Printing* survived the RLA's passage in 1926, thus making it illegal to have a secondary boycott even after its enactment. It is apparent why appellants have not pressed this point, however.

In 1932, Congress enacted the Norris-LaGuardia Act.[29] Section 1 thereof unequivocably states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[30]

Section 2 proceeds to state that in the interpretation of this statute and "in determining the jurisdiction and authority of the courts of the United States . . . [it is] the public policy of the United States . . . that [employees] shall be free from the interference, restraint, or coercion of employees of labor . . . in [the effectuation of] concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31] In labor parlance, "concerted activities," of course, includes strikes and secondary boycotts. *See Jacksonville Bulk Terminals, Inc., supra.*

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[28] 45 U.S.C. § 151, Fifth.

[29] 47 Stat. 70, 29 U.S.C. §§ 101-115.

[30] 29 U.S.C. § 101.

[31] 29 U.S.C. § 102.

The Norris-LaGuardia Act is anything but vague regarding acts that are *not* subject to the equitable jurisdiction of the courts of the United States. Section 4 specifically deprives federal courts of power to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit the following acts:

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.[32]

This is exactly the conduct that appellants seek to enjoin.

It is Section 13, however, which is most damaging to appellants' contentions. It defines the term "labor dispute" as including:

> *any controversy* concerning terms or conditions of employment, or concerning the association or representation of person in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[33]

This provision was specifically enacted to overrule the Supreme Court's decision in *Duplex Printing*. *See H.R. Rep. No. 669*, 72d Cong., 1st Sess. 10 (1932); *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 703 (1965) (Goldberg, J., concurring); *United States* v. *Hutcheson*, 312 U.S. 219, 229-30 (1941); Cox, Bok & Gorman, *Labor Law, supra*, at 55-60. Furthermore, it was intended by Congress that the provision be broadly interpreted. *See Corporate Printing Co., Inc.* v. *New York Typographical Union No. 6*, 555 F.2d 18 (2d Cir. 1977). It has

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[32] 29 U.S.C. § 104(e), (i).

[33] 29 U.S.C. § 113(c). Emphasis supplied.

thus been regarded as a limitation against enjoining even controversies whose genesis is political protest, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702 (1982) (refusal to handle ships of the U.S.S.R. in protest of invasion of Afghanistan), and to cover intraunion disputes. *See Bodecker* v. *Local Union No. P-46*, 640 F.2d 182 (6th Cir. 1983).

More on point, however, it is unquestioned that since its enactment, this section, together with the specific language of the other conditions previously pointed out, deprived federal courts of *any* jurisdiction to enjoin secondary boycotts. *See Iron Workers* v. *Pauly Jail Bldg. Co.*, 118 F.2d 615, 620 (8th Cir.), *cert. denied*, 314 U.S. 639 (1941); *Wilson & Co.* v. *Birl*, 105 F.2d 948, 952 (3d Cir. 1939); *Cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437 (1948) (where the picketing is not related to a labor dispute the activity may be enjoined). Although the decided cases on the issue of secondary boycotts do not include any carriers or labor organizations covered by the RLA, the language of these decisions places great reliance on the all inclusive language of the Norris-LaGuardia Act prohibition. This reliance is particularly relevant when we consider that the statute was enacted to deal with a specific issue, to control the issuance of injunctions by federal courts in cases of labor disputes, rather than the broader purposes of a general labor law such as the RLA.

Appellants again look to the legislative history of the Norris-LaGuardia Act for support for their contention that secondary boycotts in the railway industry were excluded from its coverage. Congressman Beck proposed an amendment which would have excluded labor disputes in the railroad industry from the proscription of Section 4 of the RLA.[34] In opposition, Congressman LaGuardia stated that this amendment was unnecessary because the RLA "provided a machinery . . . for settling labor disputes."[35] The amendment was then defeated. We cannot agree that this incidental exchange is sufficient to defeat the specific and encompassing exclusion of

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[34] 75 Cong. Rec. 5503 (Mar. 8, 1932).

[35] *Id.* at 5499.

the Norris-LaGuardia Act. The exchange means only that the RLA establishes the procedures which must be followed prior to any strike activity taking place. Once they are exhausted, however, both parties may resort to self-help, as they have done in this case. However, if they engage in self-help activities before exhaustion of the machinery established for dispute resolution, the action may be enjoined notwithstanding the Norris-LaGuardia Act. It is only because there is such machinery that the Supreme Court has carved out exceptions to the statute. *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) ("minor" disputes to be submitted to Adjustment Board for compulsory arbitration); *Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) ("major" disputes). *Cf. Boys' Market, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (injunction available to enforce contractual no strike clause if the grievance subject to arbitration). In this case, however, the parties have exhausted the pre-self-help dispute resolution procedures. They are thus free to engage in peaceful conduct to seek improvement of their respective positions.

Congress has not been reticent to prohibit secondary boycotts and to provide injunctive relief against them when it has considered it advisable.

In 1935 it enacted the National Labor Relations Act (Wagner Act), 49 Stat. 449, whereby the organizational rights of employees were generally recognized throughout the industrial and business sectors of the United States. The statute provided for unfair labor practices by employers, but contained no such prohibitions against labor organizations. Furthermore, the Act did not restrict secondary boycotts or picketing. *See Allen Brudely Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945); *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942). It was not until the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 140, that Congress mentioned, and thereafter prohibited, secondary boycotts. *See* 29 U.S.C. 158(b)(4).[36] *See generally* Millis &

[36] Interestingly enough, during the debates for the enactment of the Taft-Hartley Act, Senator Taft was of the view that secondary boycotts by railroad employees were protected by the RLA. 93 Cong. Rec. 6498, 2 Legislative History of the Labor were Management Relations Act, 1947, p. 1571.

Brown, *From the Wagner Act to Taft Hartley* (1950); Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 Harv. L. Rev. 1 (1947). When Congress perceived various loop holes in that statute it proceeded to enact the Landum-Griffin Act in 1959, 73 Stat. 525, 542, 545, and thus prohibited "hot cargo" clauses and similar conduct. 29 U.S.C. § 158(e).

It is significant not only that Congress has known how to specifically enact prohibitions against secondary activity, but also that Congress has not left to private enforcement the enjoining of secondary conduct. Such powers, when permitted, have *only* been granted to a designated federal agency, the National Labor Relations Board. *See* 29 U.S.C. § 160.

From all of the above we conclude that there are indeed some areas in the field of railroad labor relations that have been left unregulated. Whether this state of affairs should be allowed to remain is an affair of state, not a matter for the courts to correct. By now there should be no question that courts are not constitutionally empowered to enact legislation.

We should keep in mind what the Supreme Court stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 386 (1968), a case in which the issues were closely related to the matters before us:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relation has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting that those separating primary from "secondary" activities.

Citations omitted.

Appellant should seek relief not before this Court, but before Congress.

III

Lastly, appellants argue that the Norris-LaGuardia Act must be read in context with the Interstate Commerce Act, 49 U.S.C. § 11101 *et seq.*, which establishes a national policy in favor of providing uninterrupted rail transportation. This policy, appellants claim, as expressed in 49 U.S.C. §§ 11101(a) ("A common carrier . . . shall provide the transportation or service on reasonable request") and 10741 (prohibitions against discrimination by common carrier), permits the issuance of an injunction to prevent secondary picketing. To say the least, this argument is far-fetched.

It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute. *See* 49 U.S.C. §§ 10101, 10101a. It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory reasons,[37] there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure.*[38] If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. Obviously, such an argument cannot be seriously made.

We thus agree with our brethern of the Seventh Circuit that the Interstate Commerce Act does not provide leave to ignore the proscriptions of the Norris-LaGuardia Act. *Burlington Northern R. Co., supra,* 793 F.2d at 800. *See also Order of Railroad Telegraphics* [sic] v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960); *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91, 103 (1940).

The order of the district court denying injunctive relief is *affirmed.*

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[37] Just as it could not at common law. *See American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 406 (1967).

[38] *See Mishara Constr. Co.* v. *Transit-Mixed Concrete Corp.*, 310 N.E.2d 363 (Mass. 1974) (recognizing that when labor dispute is unexpected and occurrence of the dispute presents unusual difficulty "the excuse of impracticability may well be applicable").